

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

Kathy O. Rushton, Special Referee

Case No. 2008-CP-41-099

BOBBY JO CLARK

Respondents

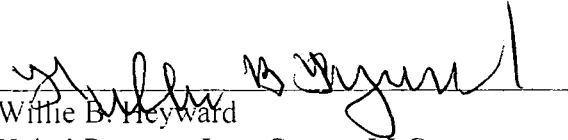
vs

FAIRY BELL IRVING

Appellants

MEMORANDUM IN SUPPORT OF APPELLANT'S RETURN TO RESPONDENT'S
MOTION TO DISMISS APPEAL

December 24, 2012.


Willie B. Heyward
Heirs' Property Law Center, LLC
27 Gamecock Ave., Suite 200
Charleston, S.C. 29407
Attorney for Joyce Thelma Irving
(843) 225-8754
Bar Number: 11063

Other Counsel of Record:
Christian G. Spradley
110 S. Main Street
Saluda, SC 29138
Attorney for Respondent
(864) 445-4544
Bar Number: 13755

RECEIVED
DEC 31 2012
SC Court of Appeals

Pursuant to Rule 240(c) of the South Carolina Appellate Court Rules, the Appellant, Joyce Thelma Irving, through her undersigned attorney, herein respectfully files this Memorandum in Support of her Return to Respondent's Motion to Dismiss this Appeal.

PROCEDURAL BACKGROUND

The Respondent's procedural history of the matter is substantially correct.

1. The Appellant, Joyce Thelma Irving, filed this Appeal purportedly based upon an Order dated June 1, 2010. The Notice of Appeal states that Appellant did not receive written notice of the entry of this judgment until February 26, 2011. On June 2, 2010, an Order for Sale was entered into the record in this matter. Attorney for the Appellant filed an Appeal Notice with the Saluda County Clerk of Court's office on March 29, 2011. (See Exhibit 1).
2. A Motion to Dismiss the Appeal was filed on June 2, 2011, alleging that the Attorney for the Appellant did not properly file the Appeal with the South Carolina Court of Appeals (See Exhibit 2).
3. As a result of a hearing held on November 15, 2011 and an Order, dated December 20, 2011, which, among other things, granted the parties the right to dismiss the Appeal since the Appeal was never perfected as an Appeal per Rule 240(c) of the South Carolina Appellate Court Rules that requires filing the Circuit Court, Appellate Court and payment of the filing fees. (See Exhibit 3). Due to a financial hardship my client could not continue with the appeal. This Order was served on the Appellant on January 3, 2012. Respondent was served with a Notice of Appeal which stated that the Appellant is appealing the Order of the Honorable Kathy O. Rushton dated December 9, 2011. (See

Exhibit 4). Appellant was given leave to file an Amended Notice of Appeal because of an incorrect caption. The Amended Notice of Appeal stated that the Appellant was appealing the Order of the Honorable Kathy Rushton, dated June 1, 2010. (See Exhibit 5). A Second Amended Notice of Appeal was filed on that indicated the Appellant was appealing judgment of The Honorable Kathy Rushton dated June 1, 2010 (Emphasis added) (See Exhibit 6) . This "Second Notice of Appeal" has apparently not been filed with Saluda County Clerk of Court's Office. Appellant is appealing the judgment dated December 9, 2011, and based upon the Amended Notices of Appeal that were filed and served upon Respondent.

HISTORICAL BACKGROUND

Appellant's counsel signed an acceptance of service in the Respondent's attorney's office after assurances that he could not locate my client for service of the pleadings and that the Complaint I was given was only a "draft". (See Exhibit 7) He also stated that the family-tree was still a "work in progress" and that he would welcome any input my client may have concerning the heirs and their whereabouts. One of the heirs being Julius Erving, the retired professional basketball player. Julius Erving was also purportedly served by publication. My next contact with Respondent's counsel occurred when I was served with notice of the appointment of Kathy O. Ruston, as the Special Referee in this matter. No prior notice of her appointment as Special Referee was ever afforded Appellant, contrary to the requirements of Section 14-11-60 of the South Carolina Code of Civil Procedure.

The daughter of my client, one Debra Green, has recently provided me with a copy of some of the notes taken by her in regards to seeking legal assistance in defending the family's

property rights. One note on November 1, 2004 indicated that she spoke with Kathy Rushton, present Special Referee. (See Exhibit 7)

A Notice of Hearing was then served upon the Appellant without any prior request for available time-frames or the amount of time needed to get Appellant and her witnesses to the hearing, in that they lived out of state. I informed the Court of the short time-frame asked for additional time. I was then informed by the Court that Appellant was in default, referencing my signature on the acceptance of service. I made a formal Motion for the Order of Default to be set-aside. (See Exhibit 9) I attended the hearing at which time my Motion for relief the Order of Default against my client, said was denied and a hearing commenced with only the Special Referee, Respondent's counsel and the Guardian ad Litem, Henrietta Gill, Esquire and myself in attendance. This hearing was not transcribed.

LEGAL AUTHORITIES AND ANALYSIS

Pursuant to South Carolina Code Annotated Section 14-3-330, the Appellate Courts have jurisdiction to hear appeals and final judgments and from intermediate judgments which involve the merits of an action. The appeal of any matter must comply with the South Carolina Appellate Court Rules. Appellant has failed to follow the following Appellate Rules:

1. Rule 203 of the South Carolina Appellate Court Rules states that "a notice of appeal shall be served on all respondents within thirty (30) days of receipt of written notice of entry of the Order of Judgment". Rule 203(d)(1)(B) states that "Notice of Appeal shall be filed with the Clerk of the lower court and with the Clerk of the appellate court within ten (10) days after the Notice of Appeal had been served". The original Notice of Appeal was served on the Respondent in February 16, 2012 and served on the Court of Appeals on February 16, 2012. (See Exhibit 4) A Motion to Dismiss the Appeal was filed and heard

on November 15, 2011 and an Order was issued that properly showed that the Appeal was never perfected by filing and the appropriate fee paid to the Appellate Court.

Thereafter Appellant filed a Motion to Set-Aside Judgment, dated June 15, 2011 (See Exhibit 8), which was denied and a new appeal filed from the order denying the Motion to Set-Aside the prior Order.

2. Appellant received a transcript of the hearing held on November 15, 2011 December 10, 2011. The transcript (See Exhibit 9) was incomplete in that there were no enclosed Exhibits nor any reference to any Exhibits proffered at the hearing. Therefore, Appellant's counsel has not filed his Initial Brief with the Court, nor has he served Respondent with his Initial Brief. The failure to attach a copy of the Order to the subsequent Notices of Appeal was inadvertent since the correct Order being challenged was attached to the original Notices of Appeal.
3. Appellant has attempted to file a Notice of Appeal to comply with the requirements of Rule 203(d)(1)(B)(ii) of the Appellate Court Rules however an error the caption was noted by the Appellate Court and Appellant's counsel endeavored to correct said error.
4. This contest over ownership of this approximately 100 acre parcel has been percolating for some while and the arbitrary denial of the Appellant's right to confront and cross-examine witnesses has been abridged by any measure of fairness and equity. The Courts have stressed the importance of parties being accorded the right to confront witnesses. A South Carolina Supreme Court case has reinforced the importance of parties being afforded due process. In *Donna Moore v. Lance Moore*, 657 S.E. 2d 743, (S.C. 2008), the Court again repeating the due process requirement in *Sloan v. South Carolina Board of Physical Therapy Examiners*, 370 S.C. 452, 636, S.E. 2d 598 (2006) (See Exhibit 10)

In *Sloan v. South Carolina Board of Physical Therapy Examiners*, the Court explained:

Procedural due process requirements are not technical no particular form of procedure is necessary. In *re Vora*, 354 S.C. at 595, 582 S.E.2d at 416 “[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” *Wilson*, 352 S.C. at 452, 574 S.E.2d at 733 (quoting *Morrissey v. Brewer*, 408, 494 (1972)). The requirements in a particular case depend on the importance of the interest involved and the circumstances under which the deprivation may occur. *S.C. Dept. of Soc. Servs. V. Beeks*, 325 S.C. 243, 246, 481 S.E.2d 703, 705 (1997).

Sloan v. S.C. Bd. Of Physical Therapy Examr’s 370 Ss.C.. 452, 484, 636 S.E.2d 598, 615 (2006).” ‘Where important decisions turn n questions of fact, due process often requires an opportunity to confront and cross examine adverse witnesses.’ ” *S.C. Dep’t of Soc. Servs. V. Wilson*, 352 S.C. 445, 452, 574 S.E.2d 730, 734 (2002) (quoting *Brown v. S.C. State Bd. Of Edu.*, 301 S.C. 326, 329, 391 S.E.2d 866, 867 (1990)) (See Exhibit 10)

The opinion of the Court appears to indicate that “due process” must be more than just window dressing but must afford the parties an opportunity to fully protect the interest involved. The interest in this particular case being Appellant’s property rights.

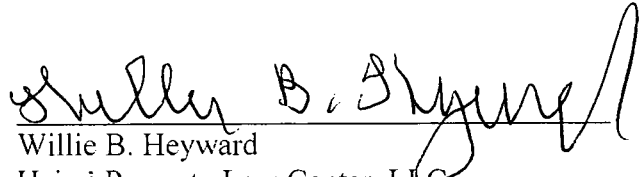
5. The alternate procedure in partition actions details the procedure to be followed when the non-partitioning co-tenant gives notice that they want to purchase the interest of the partitioning party. Again the usual procedure for sale was followed without any determination of the petitioning co-tenant’s interest. This was done in light of the statute’s explicit dictates that the Right of First Refusal survives Default.

CONCLUSION

The Appellant’s counsel is asking the Appellate Court to grant additional time for the Appellant to recover any and all exhibits from the November 15, 2011 hearing and to correct any errors, if any, in the Notice of Appeal and to properly file same with the Clerk of Court of Saluda County. Appellant’s counsel bases this request upon the issues presented in Appellant’s Memorandum in support of his position.

Prejudice to my clients position will result as a consequences of the loss of her ability to get redress, any opportunity to be heard and to fully adjudicate her position in reference to this property.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Willie B. Heyward", written over a horizontal line.

Willie B. Heyward
Heirs' Property Law Center, LLC
27 Gamecock Ave., Suite 200
Charleston, S.C. 29407
Attorney for Joyce Thelma Irving
(843) 225-8754

December 24, 2012

EXHIBIT 1

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

Kathy O. Ruston, Special Referee

Case No. 2008-CP-41-099

Richard Clark

Respondent,

v.

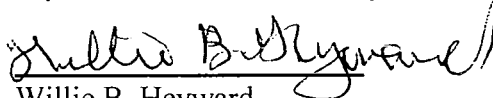
Fairy Bell Irving, et al.,

Appellant.

NOTICE OF APPEAL

Willie B. Heyward appeals the order of the Honorable Kathy O. Ruston dated June 1, 2010. Appellant received written notice of entry of this order on February 26, 2011.

March 23, 2011


Willie B. Heyward
27 Gamecock Ave. Ste. 200
Charleston, South Carolina 29407
(843) 225-8754
Attorney for Appellant

Other Counsel of Record:
Christian G. Spradley
110 S. Main Street
Saluda, South Carolina 29138
Attorney for Respondent
(864) 445-7441

FILED
2011 MAR 29 AM 9:50
CLERK OF COURT
SALUDA CO. S.C.

EXHIBIT-2

STATE OF SOUTH CAROLINA

COUNTY OF SALUDA

FILED

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

2011 JUN -2

CASE NO.: 2008-CP-41-099

AM 10:20

BOBBY JO CLARK, AS PERSONAL
REPRESENTATIVE OF THE
ESTATE OF RICHARD CLARK,

CLERK OF COURT
SALUDA CO. S.C.

MOTION AND ORDER INFORMATION

Plaintiff,)

FORM AND COVERSHEET

vs.)

FAIRY BELL IRVING, ANDREW IRVING,
A/K/A ANDREW ERVING, ALFONZO
IRVING, A/K/A ALFONZO ERVING,
JOHN D. IRVING, A/K/A JOHN D.
ERVING, WILLIAM T. IRVING, A/K/A
WILLIAM T. ERVING, ROBERT IRVING,
SR., A/K/A ROBERT ERVING, SR., SALLY
MAY MORGAN, F/K/A SALLY MAY
IRVING, MINNIE LEE BUTLER, F/K/A
MINNIE LEE IRVING, JOYCE THELMA
TAYLOR, F/K/A JOYCE THELMA
IRVING, MARY IRVING, A/K/A MARY
ERVING, MAMIE IRVING, A/K/A
MAMIE ERVING, JESSIE INA IRVING,
A/K/A JESSIE INA ERVING, JULIOUS
IRVING, A/K/A JULIOUS ERVING,
RASHELL IRVING, FAIRY MAY
IRVING, THELMA IRVING, ANNELL I.
RAY, JULIOUS IRVING, JR., ALFRDA
IRVING, THELMA CARTLELE, BENNIE
WARREN BUTLER AND PERSONS
CLAIMING ANY RIGHT, TITLE
ESTATE, INTEREST IN OR LIEN UPON
THE REAL ESTATE DESCRIBED IN
THE COMPLAINT HEREIN, ANY
UNKNOWN ADULTS BEING A CLASS
DESIGNATED AS JOHN DOE; AND ANY
UNKNOWN MINORS OR OTHER
PERSONS UNDER LEGAL DISABILITY
BEING A CLASS DESIGNATED AS
RICHARD ROE,

Defendant.)

Plaintiff's Attorney:

Christian G. Spradley, Bar No. 13755

Address:

110 S. Main Street, Saluda, SC 29138

Phone: 864-445-4544 Fax 864-445-7441

E-mail: _____ Other: _____

Defendant's Attorney:

Willie B. Heyward for Defendant, Thelma Irving,
Bar No. _____

Address:

27 Gamecock Ave., Suite 200, Charleston SC
29407

Phone: 843-225-8754 Fax _____

- ☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Notice of Motion and Motion to Dismiss Appeal

Estimated Time Needed: 15 minutes

Court Reporter Needed: ☒ YES/☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff/☐ Defendant

6/02/11

Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: \$

☐ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,

reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: Margaret N. Lewis Date Filed: 6/25/11

☒ MOTION FEE COLLECTED: \$ 25.00

☐ CONTESTED – AMOUNT DUE: \$ _____

STATE OF SOUTH CAROLINA)
)
COUNTY OF SALUDA)

IN THE COURT OF COMMON PLEAS

BOBBY JO CLARK, AS PERSONAL)
REPRESENTATIVE OF THE ESTATE)
OF RICHARD CLARK,)
Plaintiff,)
vs)

FAIRY BELL IRVING, ANDREW IRVING,)
A/K/A ANDREW ERVING, ALFONZO IRVING,)
A/K/A ALFONZO ERVING, JOHN D. IRVING,)
A/K/A JOHN D. ERVING, WILLIAM T. IRVING,)
A/K/A WILLIAM T. ERVING, ROBERT IRVING,)
SR., A/K/A ROBERT ERVING, SR., SALLY)
MAY MORGAN, F/K/A SALLY MAY IRVING,)
MINNIE LEE BUTLER, F/K/A MINNIE LEE)
IRVING, JOYCE THELMA TAYLOR, F/K/A)
JOYCE THELMA IRVING, MARY IRVING,)
A/K/A MARY ERVING, MAMIE IRVING A/K/A)
MAMIE ERVING, JESSIE INA IRVING, A/K/A)
JESSIE INA ERVING, JULIOUS IRVING, A/K/A)
JULIOUS ERVING, RASHELL IRVING, FAIRY)
MAY IRVING, THELMA IRVING, ANNELL I.)
RAY, JULIOUS IRVING, JR., ALFREDA IRVING,)
THELMA CARTLELE, BENNIE WARREN)
BUTLER And PERSONS CLAIMING ANY)
RIGHT, TITLE ESTATE,)
INTEREST IN OR LIEN UPON THE REAL)
ESTATE DESCRIBED IN THE COMPLAINT)
HEREIN, ANY UNKNOWN ADULTS BEING A)
CLASS DESIGNATED AS JOHN DOE; AND)
ANY UNKNOWN MINORS OR OTHER)
PERSONS UNDER LEGAL DISABILITY BEING)
A CLASS DESIGNATED AS RICHARD ROE,)
Defendants.)

FILED
2011 JUN -2 AM 10:20
CLERK OF COURT
SALUDA CO. S.C.

**NOTICE OF MOTION AND
MOTION TO DISMISS
APPEAL**

2008-CP-41-099

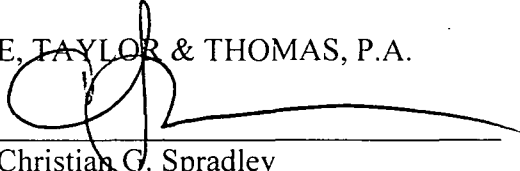
TO DEFENDANTS:

YOU WILL PLEASE TAKE NOTICE that the undersigned counsel for Plaintiffs will move the Court within ten (10) days after service hereof, or as soon thereafter as counsel may be heard, shall move before the Court to dismiss the Appeal filed by Defendant, Thelma Irving on

March 29, 2011. This motion is based upon the South Carolina Appellate Court Rules and specifically Rule 203 thereof. Defendant, Thelma Irving failed to file the Notice of Appeal with the Clerk of the South Carolina Court of Appeals within ten (10) days after the Notice of Appeal was served.

MOORE, TAYLOR & THOMAS, P.A.

By: _____


Christian G. Spradley
110 South Main Street
Saluda, South Carolina 29138
(864) 445-4544

Saluda, South Carolina

June 2, 2011.

EXHIBIT 3

STATE OF SOUTH CAROLINA)
COUNTY OF SALUDA)

IN THE COURT OF COMMON PLEAS

BOBBY JO CLARK, AS PERSONAL
REPRESENTATIVE OF THE ESTATE
OF RICHARD CLARK,

Plaintiff,

vs

FAIRY BELL IRVING, ANDREW IRVING,
A/K/A ANDREW ERVING, ALFONZO IRVING,
A/K/A ALFONZO ERVING, JOHN D. IRVING,
A/K/A JOHN D. ERVING, WILLIAM T. IRVING,
A/K/A WILLIAM T. ERVING, ROBERT IRVING,
SR., A/K/A ROBERT ERVING, SR., SALLY
MAY MORGAN, F/K/A SALLY MAY IRVING,
MINNIE LEE BUTLER, F/K/A MINNIE LEE
IRVING, JOYCE THELMA TAYLOR, F/K/A
JOYCE THELMA IRVING, MARY IRVING,
A/K/A MARY ERVING, MAMIE IRVING A/K/A
MAMIE ERVING, JESSIE INA IRVING, A/K/A
JESSIE INA ERVING, JULIOUS IRVING, A/K/A
JULIOUS ERVING, RASHELL IRVING, FAIRY
MAY IRVING, THELMA IRVING, ANNELL I.
RAY, JULIOUS IRVING, JR., ALFREDA IRVING,
THELMA CARTLELE, BENNIE WARREN
BUTLER And PERSONS CLAIMING ANY
RIGHT, TITLE ESTATE,
INTEREST IN OR LIEN UPON THE REAL
ESTATE DESCRIBED IN THE COMPLAINT
HEREIN, ANY UNKNOWN ADULTS BEING A
CLASS DESIGNATED AS JOHN DOE; AND
ANY UNKNOWN MINORS OR OTHER
PERSONS UNDER LEGAL DISABILITY BEING
A CLASS DESIGNATED AS RICHARD ROE,

Defendants.

FILED
2011 DEC 20 PM 4:14
CLERK OF COURT
SALUDA CO. S.C.

ORDER

2008-CP-41-099

This matter was scheduled before the appointed Special Referee, Kathy O. Rushton for a hearing on a Motion filed by Plaintiff for the dismissal of an Appeal filed by Defendant Thelma Irving, and a Motion filed by Defendant Thelma Irving to set aside the Order of Sale. The hearing was scheduled for 11:00 a.m. on November 15, 2011. Present at the time of the hearing

CM

were Special Referee Kathy O. Rushton, Christian G. Spradley, attorney for the Plaintiff, Henrietta Gill, appointed Guardian ad Litem, and Willie B. Heyward, attorney for Defendant Thelma Irving.

PLAINTIFF'S MOTION TO DIMSISS APPEAL

It appears that March 29, 2011, Defendant Thelma Irving filed a Notice of Appeal with the Saluda County Clerk of Court's Office and served the same upon Plaintiff's attorney. Plaintiff filed a Motion to Dismiss the appeal based upon Defendant's failure to properly file the Appeal. This Motion was properly filed and served upon the parties. Based upon a letter presented without objection by Plaintiff, the Appeal was never properly filed with the Court of Appeals. This letter is attached to this order as Exhibit #1. Further, in Defendant Thelma Irving's Memorandum in Support of Motion filed with this Court, in paragraph 8 she states "[t]he Notice of Appeal was **not** filed with the South Carolina Court of Appeals." (Emphasis in original.) Rule 203 of the South Carolina Rules of Appellate Practice requires that notice of an appeal be filed with the Court of Appeals within 10 days of the serving of the Notice of Appeal. There is uncontradicted evidence that the notice was never filed with the Court of Appeals. Therefore, Plaintiff's motion is **GRANTED** and the Notice of Appeal filed with the Saluda County Clerk of Court's Office is **DISMISSED**.

DEFENDANT THELMA IRVING'S MOTION TO SET ASIDE THE ORDER OF SALE

A hearing was held on April 27, 2010, which is memorialized in an order which was signed by Special Referee Kathy Rushton on June 1, 2010, and filed in the Clerk of Court's Office for Saluda County on June 2, 2010. Due to confusion as to who would serve the Order, it was not served until February of 2011. Defendant Thelma Irving attempted to file an appeal of that Order which has been dismissed for failure to properly file the appeal. It came to the Special

Referee's attention that no filing fee was ever paid by Defendant Thelma Irving, and that only a Notice of a Motion was filed as there was no true Motion. The Court however heard arguments as if the Motion was properly filed and served. Plaintiff argued and the Court agrees that SCRCF Rule 60 is the only possibility for a proper motion based upon the facts argued by Defendant Thelma Irving. It is uncontradicted that Mr. Heyward was served with the Order he is now complaining of on February 26, 2011. There is no explanation offered as to why he waited four months to file any type of document against the Order. Nothing new was discovered during the four months. Further, Defendant's only argument is that the judgment is void which is incorrect. As was pointed out by Plaintiff, "[t]he definition of 'void' under the voidness provision of relief-from-judgment rule only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction." The Linda Mc Company, Inc. v. Shore, 653 S.E.2d 279, 375 S.C. 432 (Ct.App 2007). No argument was made that anyone's due process rights were infringed upon or that the Court lacked subject matter or personal jurisdiction over the complaining party. To the contrary, proper notice was afforded everyone, this Court has subject matter jurisdiction, and this Court has personal jurisdiction over this Defendant.

Defendant argued that the April 2010 hearing was not recorded or transcribed as required by SCRCF 71. Rule 71 states in pertinent part "[i]n all actions a record of hearings shall be made and preserved in the case file in the office of the clerk of court. In the present case, all Defendants were in default at the time of the hearing and a very specific and lengthy order was written detailing everything which was testified to along with a large packet of exhibits which were placed with the order in the Clerk of Court's file. There is no requirement of a Court Reporter being present or that an actual recording be made, only that a record of the hearing be filed which in the instant case is the Order and exhibits. Further, Defendant argues that the

family tree and certain conveyances were testified to at the April 2010 hearing. She does not argue that they are incorrect. However, it is clear that Defendant Thelma Irving is the last surviving direct heir of the original owner and that she is entitled to 12.5% of the subject property. No evidence was entered or even discussed that her share should be more. There were no affidavits entered which would tend to show that any of the Court's previous findings were erroneous; that there was any mistake, inadvertence, surprise, or neglect; that there was any newly discovered evidence; that there was any fraud, misrepresentation, or misconduct by anyone; that the judgment was void; or that the judgment was satisfied, released or discharged. There was no evidence placed into the record at all by Defendant Thelma Irving.

The Court finds that Defendant's request to set aside the Order from the April 27, 2010, hearing is denied for the following reasons:

1. Defendant Thelma Irving failed to properly file any motion and failed to pay the required filing fee;
2. Even if the documents filed on June 20, 2011 were properly filed as a motion that such filing was not made timely;
3. Even if the documents filed on June 20, 2011 were properly filed and were deemed timely there is no evidence of any mistake, inadvertence, surprise, or neglect; that there was any newly discovered evidence; that there was any fraud, misrepresentation, or misconduct by anyone; that the judgment was void; or that the judgment was satisfied, released or discharged;
4. Even if there was some evidence under SCR 60(b) there has been no prejudice to Defendant Thelma Irving as her share of the property would still be 12.5%, therefore there has been no prejudice to her.

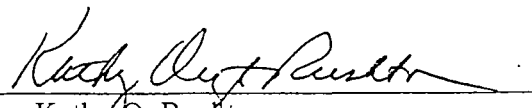
No evidence was entered and none was offered to substantiate any of Defendant's claims. There is no choice but to DENY Defendant's request.

ORDER

IT IS THEREFORE ORDERED that Plaintiff's motion is GRANTED and the Notice of Appeal filed by Defendant Thelma Irving with the Saluda County Clerk of Court's Office is DISMISSED.

IT IS FURTHER ORDERED that Defendant Thelma Irving's motion to set aside the Order of Sale from the April 27, 2010, hearing is DENIED for the above reasons.

IT IS FURTHER ORDERED that Plaintiff's attorney is directed to move forward with the sale of the subject property as stated in the Order of Sale.

By: 
Kathy O. Rushton
Special Referee

December 9, 2011,

Saluda, South Carolina.

EXHIBIT 1

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

Kathy O. Ruston, Special Referee

Case No. 2008-CP-41-099

Bobby Jo Clark, as Personal
Representative of the Estate of
Richard Clark,

Respondent,

v.

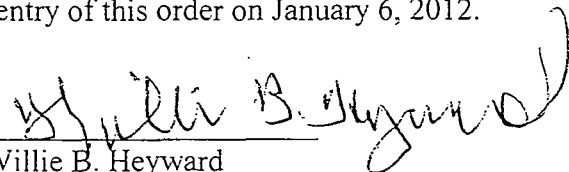
Fairy Bell Irving, et al..

Appellant.

NOTICE OF APPEAL

Willie B. Heyward appeals the order of the Honorable Kathy O. Ruston dated December 9, 2011. Appellant received written notice of entry of this order on January 6, 2012.

February 6, 2012


Willie B. Heyward
27 Gamecock Ave, Ste. 200
Charleston, South Carolina 29407
(843) 225-8754
Attorney for Appellant

Other Counsel of Record:
Christian Spradley
110 S. Main Street
Saluda, South Carolina 29138
Attorney for Respondent
(843) 445-7441

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

Kathy O. Rushton, Special Referee

Case No. 2008-CP-41-099

BOBBY JO CLARK, AS PERSONAL
REPRESENTATIVE OF THE ESTATE
OF RICHARD CLARK,

Respondents,

vs

FAIRY BELL IRVING, ANDREW IRVING,
A/K/A ANDREW ERVING, ALFONZO IRVING,
A/K/A ALFONZO ERVING, JOHN D IRVING,
A/K/A JOHN D. ERVING, WILLIAM T. IRVING,
A/K/A WILLIAM T ERVING, ROBERT IRVING,
SR., A/K/A ROBERT ERVING, SR., SALLY
MAY MORGAN, F/K/A SALLY MAY IRVING,
MINNIE LEE BUTLER, F/K/A MINNIE LEE
IRVING, JOYCE THELMA TAYLOR, F/K/A
JOYCE THELMA IRVING, MARY IRVING,
A/K/A MARY ERVING, MAMIE IRVING A/K/A
MAMIE ERVING, JESSIE INA IRVING, A/K/A
JESSIE INA ERVING, JULIOUS IRVING, A/K/A
JULIOUS ERVING, RASHELL IRVING, FAIRY
MAY IRVING, THELMA IRVING, ANNELL I.
RAY, JULIOUS IRVING, JR., ALFREDA IRVING,
THELMA CARTLELE, BENNIE WARREN
BUTLER AND PERSONS CLAIMING ANY
RIGHT, TITLE ESTATE, INTEREST IN OR
LIEN UPON THE REAL ESTATE DESCRIBED
IN THE COMPLAINT

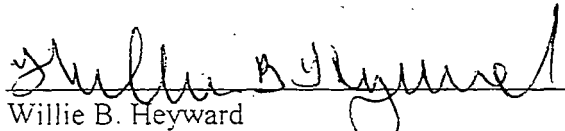
HEREIN, ANY UNKNOWN ADULTS BEING A
CLASS DESIGNATED AS JOHN DOE; AND
ANY UNKNOWN MINORS OR OTHER
PERSONS UNDER LEGAL DISABILITY BEING
A CLASS DESIGNATED AS RICHARD ROE,

Appellants

AMENDED NOTICE OF APPEAL

Willie B. Heyward appeals the Order Judgment of the Honorable Kathy Ruston, dated June 1, 2010. Appellant received written notice of entry of this Order on February 26, 2011.

March 9, 2012.



Willie B. Heyward
Heirs' Property Law Center, LLC
27 Gamecock Ave., Suite 200
Charleston, S.C. 29407
Attorney for Joyce Thelma Irving
(843) 225-8754
Bar Number: 11063

Other Counsel of Record:
Christian G. Spradley
110 S. Main Street
Saluda, SC 29138
Attorney for Respondent
(864) 445-4544
Bar Number: 13755

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

Kathy O. Rushton, Special Referee

Case No. 2008-CP-41-099

BOBBY JO CLARK, AS PERSONAL
REPRESENTATIVE OF THE ESTATE
OF RICHARD CLARK.

Respondents,

vs

FAIRY BELL IRVING, ANDREW IRVING,
A/K/A ANDREW ERVING, ALFONZO IRVING,
A/K/A ALFONZO ERVING, JOHN D IRVING,
A/K/A JOHN D. ERVING, WILLIAM T. IRVING,
A/K/A WILLIAM T ERVING, ROBERT IRVING,
SR., A/K/A ROBERT ERVING, SR., SALLY
MAY MORGAN, F/K/A SALLY MAY IRVING,
MINNIE LEE BUTLER, F/K/A MINNIE LEE
IRVING, JOYCE THELMA TAYLOR, F/K/A
JOYCE THELMA IRVING, MARY IRVING,
A/K/A MARY ERVING, MAMIE IRVING A/K/A
MAMIE ERVING, JESSIE INA IRVING, A/K/A
JESSIE INA ERVING, JULIOUS IRVING, A/K/A
JULIOUS ERVING, RASHELL IRVING, FAIRY
MAY IRVING, THELMA IRVING, ANNELL I.
RAY, JULIOUS IRVING, JR., ALFREDA IRVING,
THELMA CARTLELE, BENNIE WARREN
BUTLER AND PERSONS CLAIMING ANY
RIGHT, TITLE ESTATE, INTEREST IN OR
LIEN UPON THE REAL ESTATE DESCRIBED
IN THE COMPLAINT

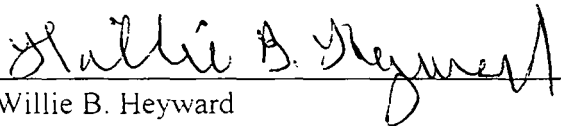
HEREIN, ANY UNKNOWN ADULTS BEING A
CLASS DESIGNATED AS JOHN DOE; AND
ANY UNKNOWN MINORS OR OTHER
PERSONS UNDER LEGAL DISABILITY BEING
A CLASS DESIGNATED AS RICHARD ROE.

Appellants

SECOND AMENDED NOTICE OF APPEAL

Joyce Thelma Irving appeals the order Judgment of the Honorable Kathy Ruston, dated June 1, 2010 . Appellant received written notice of entry of this Order on February 26, 2011.

April 11 , 2012.



Willie B. Heyward
Heirs' Property Law Center, LLC
27 Gamecock Ave., Suite 200
Charleston, S.C. 29407
Attorney for Joyce Thelma Irving
(843) 225-8754
Bar Number: 11063

Other Counsel of Record:
Christian G. Spradley
110 S. Main Street
Saluda, SC 29138
Attorney for Respondent
(864) 445-4544
Bar Number: 13755

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF SALUDA)

CASE NO.: 2008-CP-41-099

BOBBY JO CLARK, As Personal)

Representative of the Estate of)

Richard Clark)

Plaintiff)

**CERTIFICATE OF SERVICE
BY MAIL**

-Versus-)

FAIRY BELL IRVING, ET AL)

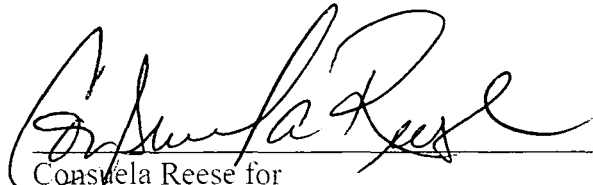
Defendants)

I hereby certify that on April 13, 2012, I mailed with first class postage affixed, the Second Amended Notice of Appeal in the above-referenced case to:

Christian G. Spradley, Esq.
Moore, Taylor & Thomas, P.A.
110 S. Main Street
Saluda, SC 29138

Special Referee
Hon. Kathy O. Rushton
108 W. Butler Ave.
Saluda, SC 29138

Henrietta Gill, Esq.
Post Office Box 2119
Leesville, SC 29070


Consuela Reese for
Willie B. Heyward, Esq.

Charleston, South Carolina
April 13, 2012

EXHIBIT 7

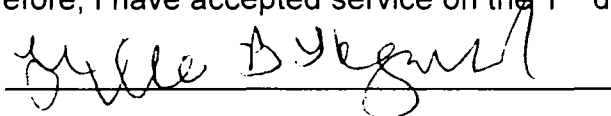
STATE OF SOUTH CAROLINA)
)
COUNTY OF SALUDA)

IN THE COURT OF COMMON PLEAS

RICHARD CLARK,)
Plaintiff,)
vs)
FAIRY BELL IRVING, ANDREW IRVING,)
A/K/A ANDREW ERVING, ALFONZO IRVING,)
A/K/A ALFONZO ERVING, JOHN D. IRVING,)
A/K/A JOHN D. ERVING, WILLIAM T. IRVING,)
A/K/A WILLIAM T. ERVING, ROBERT IRVING,)
SR., A/K/A ROBERT ERVING, SR., SALLY)
MAY MORGAN, F/K/A SALLY MAY IRVING,)
MINNIE LEE BUTLER, F/K/A MINNIE LEE)
IRVING, JOYCE THELMA TAYLOR, F/K/A)
JOYCE THELMA IRVING, MARY IRVING,)
A/K/A MARY ERVING, MAMIE IRVING A/K/A)
MAMIE ERVING, JESSIE INA IRVING, A/K/A)
JESSIE INA ERVING, JULIOUS IRVING, A/K/A)
JULIOUS ERVING, RASHELL IRVING, FAIRY)
MAY IRVING, THELMA IRVING, ANNELL I.)
RAY, JULIOUS IRVING, JR., ALFREDA IRVING,)
THELMA CARTLELE, BENNIE WARREN)
BUTLER And PERSONS CLAIMING ANY)
RIGHT, TITLE ESTATE,)
INTEREST IN OR LIEN UPON THE REAL)
ESTATE DESCRIBED IN THE COMPLAINT)
HEREIN, ANY UNKNOWN ADULTS BEING A)
CLASS DESIGNATED AS JOHN DOE; AND)
ANY UNKNOWN MINORS OR OTHER)
PERSONS UNDER LEGAL DISABILITY BEING)
A CLASS DESIGNATED AS RICHARD ROE,)
Defendants.)

2008-CP-41-099

This is to acknowledge and declare that I, Willie B. Heyward, have accepted service of the Civil Court Cover Sheet, Summons and Complaint on behalf of Joyce Thelma Irving in the above action. Therefore, I have accepted service on the 1st day of June, 2009.



Willie B. Heyward

Saluda, South Carolina June 1, 2009

EXH: B: 8

MONDAY, NOVEMBER 1, 2004

10:00 am DG called Robert K. Bouknight's Office
(Atty. who had handled TJET's younger brother's
(William Erving) business matters. Found out he was
retired.

Receptionist transferred call to another attorney in
the office (Atty. George S. Nicholson, Jr.) After explaining
the situation, Atty. Nicholson said he wouldn't be comfortable
getting involved because he was related to Atty. Coleman
(2nd or 3rd cousin).

Nicholson gave referral to Kathy Rushton (Real Estate
Lawyer in Saluda, SC).

10:00 am – 10:27 am DG called
Kathy Rushton (Atty. in Saluda, SC)

(T: 864-445 – 9307)
864-445-8177
108 West Butler Avenue
Saluda, SC 29138

She gave explanation about Title Search,
partitioning property in kind (divided in tracts),
public action of land.

She wanted all money upfront –
no guarantees. Gave impression that
we would have to go to court and we
would lose if we didn't have a lot of
money to go up against Clark.

Decided not to follow-up with her.

HEIRS'
PROPERTY
LAW CENTER,
LLC.

27 Gamecock Ave
Suite 200
Charleston, SC 29407

Ph: (843) 225-8754
Ph2: (843) 568-4679
Fax: (843) 225-8765

www.heirspropertylawcenter.org

June 15, 2011

EXH: B: + 9

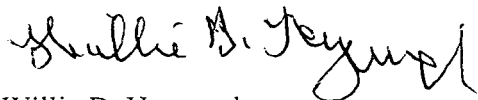
Clerk of Court / Common Pleas
County of Saluda
100 E. Church Street
Saluda, S.C. 29138

**Re: Bobby Jo Clark, As Personal Representative of the Estate of Richard Clark
vs. Fairy Bell Irving et al.
Case No: 2008-CP-41-099**

Dear Sir/Madam:

Enclosed please find the original and a copy of the Notice of Motion and the Memorandum in Support of the Motion in the above-referenced matter. Please file same and return the clocked copies to me in the self-addressed, stamped envelope provided herein.

By copy of this letter, I am serving the Plaintiff's attorney with a copy of the Notice of Motion and the Memorandum in Support of the Motion addressed as stated below. Thank you for your consideration in this matter.



Willie B. Heyward
Attorney for Defendant, Thelma Irving

Encl: as stated

cc: Christian G. Spradley, Esq.
Moore, Taylor & Thomas, P.A.
110 S. Main Street
Saluda, SC 29138

Special Referee
Hon. Kathy O. Rushton
108 W. Butler Ave
Saluda, SC 29138

STATE OF SOUTH CAROLINA)
)
COUNTY OF SALUDA)
)
BOBBY JO CLARK, AS PERSONAL REPRESENTATIVE)
OF THE ESTATE OF RICHARD CLARK)
)
PLAINTIFF.)

vs.)

FAIRY BELL IRVING, ANDREW IRVING)
A/K/A/ ANDREW ERVING, ALFONZO IRVING)
A/K/A/ALFONZO ERVING, JOHN D. IRVING)
A/K/A JOHN D. ERVING, WILLIAM T. IRVING)
A/K/A WILLIAM T. ERVING, ROBERT IRVING,)
SR., A/K/A ROBERT ERVING,SR., SALLY MAY)
MORGAN, F/K/A SALLIE MAY IRVING, MINNIE)
LEE BUTLER, F/K/A MINNIE LEE IRVING, JOYCE)
THELMA TAYLOR, F/K/A JOYCE THELMA IRVING,)
MARY IRVING A/K/A MARY ERVING, MAMIE)
IRVING, A/K/A/ MAMIE ERVING, JESSIE INA)
IRVING A/K/A JESSIE INA ERVING., JULIOUS)
IRVING, A/K/A JULIOUS ERVING, RASHELL)
IRVING, A/K/A RASHELL ERVING, FAIRY)
MAY IRVING, THELMA IRVING, ANNELL I RAY)
JULIOUS IRVING, JR., ALFREDA IRVING,)
THELMA CARTLELE, BENNIE WARREN BUTLER,)
AND PERSONS CLAIMING ANY RIGHT, TITLE)
ESTATE, INTEREST IN OR LIEN UPON THE)
REAL ESTATE DESCRIBED IN THE COMPLAINT)
HEREIN, ANY UNKNOWN ADULTS BEING A)
CLASS DESIGNATED AS JOHN DOE; AND ANY)
UNKNOWN MINORS OR OTHER PERSONS)
UNDER LEGAL DISABILITY BEING A CLASS)
DESIGNATED AS RICHARD ROE.)
)
DEFENDANTS.)

IN THE COURT OF COMMON PLEAS

CASE NO.: 2008-CP-41-099

**MEMORANDUM IN SUPPORT OF
MOTION**

TO THE PARTIES ABOVE-NAMED:

1. The Defendant, Thelma J. Irving, (hereinafter "Defendant"), was served with an order quieting title, partition and sale on a parcel of real property located in Saluda county, South Carolina. (See attachment).

2. The undersigned attorney hereby moves for relief from this order pursuant to South Carolina Rules of Civil Procedure §60 (b).

3. A hearing held on April 27, 2010, to quiet title and partition by sale the real property that is the subject of this action. This hearing was held before the Honorable Kathy O. Ruston, the appointed Special Referee for Saluda County. A copy of the order in this matter was served upon the undersigned attorney on February 26, 2011

4. The hearing was not recorded nor transcribed which is direct contravention of the procedure enumerated in §71 (e) of the South Carolina Rules of Civil Procedure, that requires all such partition actions to be recorded.

5. The testimony offered at the hearing by the now deceased Plaintiff, contained a very extensive series of conveyances and family-tree information, without the benefit of a permanent record of same.

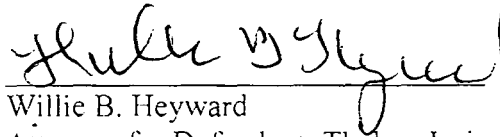
6. The judgment is therefore void and should therefore be set-aside.

7. The Defendant was served with Plaintiff's Motion to have the appeal dismissed pursuant to the South Carolina Rules of Appellate Practice §203, on June 4, 2011.

8. The Defendant filed a Notice of Appeal on the relevant parties and with the Clerk of Court for Saluda County on March 23, 2011. The Notice of Appeal was **not** filed with the South Carolina Court of Appeals.

9. The South Carolina Rules of Appellate Practice §233 requires that the Notice of Appeal be filed with the Clerk of the Appellate Court to be considered "filed" and therefore subject to dismissal pursuant to South Carolina Rules of Appellate Practice §203

10. Defendant asks that Plaintiff's motion be dismissed and that the order, dated June 1, 2010, be set-aside as void.



Willie B. Heyward
Attorney for Defendant, Thelma Irving
Heirs' Property Law Center, LLC
27 Gamecock Ave, Ste. 200
Charleston, S.C. 29407

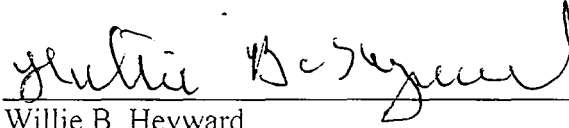
Charleston, South Carolina
June 15 2011

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SALUDA	)	CASE NO.: 2008-CP-41-099
	)	
BOBBY JO CLARK, AS PERSONAL	)	
REPRESENTATIVE OF THE ESTATE OF	)	
RICHARD CLARK,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
FAIRY BELL IRVING, ANDREW IRVING	)	
A/K/A/ ANDREW ERVING, ALFONZO IRVING	)	
A/K/A/ALFONZO ERVING, JOHN D. IRVING	)	
A/K/A JOHN D. ERVING , WILLIAM T. IRVING	)	
A/K/A WILLIAM T. ERVING, ROBERT IRVING,	)	
SR.. A/K/A ROBERT ERVING,SR., SALLY MAY	)	
MORGAN, F/K/A SALLIE MAY IRVING, MINNIE	)	NOTICE OF MOTION
LEE BUTLER, F/K/A MINNIE LEE IRVING, JOYCE	)	
THELMA TAYLOR, F/K/A JOYCE THELMA IRVING,	)	
MARY IRVING A/K/A MARY ERVING, MAMIE	)	
IRVING, A/K/A/ MAMIE ERVING, JESSIE INA	)	
IRVING A/K/A JESSIE INA ERVING., JULIOUS	)	
IRVING, A/K/A JULIOUS ERVING, RASHELL	)	
IRVING, A/K/A RASHELL ERVING, FAIRY	)	
MAY IRVING, THELMA IRVING, ANNELL I RAY	)	
JULIOUS IRVING, JR., ALFREDA IRVING,	)	
THELMA CARTLELE, BENNIE WARREN BUTLER,	)	
AND PERSONS CLAIMING ANY RIGHT, TITLE	)	
ESTATE, INTEREST IN OR LIEN UPON THE	)	
REAL ESTATE DESCRIBED IN THE COMPLAINT	)	
HEREIN, ANY UNKNOWN ADULTS BEING A	)	
CLASS DESIGNATED AS JOHN DOE; AND ANY	)	
UNKNOWN MINORS OR OTHER PERSONS	)	
UNDER LEGAL DISABILITY BEING A CLASS	)	
DESIGNATED AS RICHARD ROE,	)	
	)	
DEFENDANTS.	)	

TO: THE PARTIES ABOVE NAMED:

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney will move before Court within ten (10) days after filing or as soon thereafter as counsel may be heard, for an Order to set-aside the order of sale dated. See attached memorandum in support of Motion

RESPECTFULLY SUBMITTED.

A handwritten signature in cursive script, appearing to read "Willie B. Heyward", written over a horizontal line.

Willie B. Heyward
Heirs' Property Law Center, LLC
27 Gamecock Ave, Ste 200
Charleston, SC 29407
(843) 225-8754
Attorney for Defendant, Thelma Irving

Charleston, South Carolina
June 15 2011

EXHIBIT
10

STATE OF SOUTH CAROLINA)
COUNTY OF SALUDA)

IN THE COURT OF COMMON PLEAS

RICHARD CLARK,)
Plaintiff,)
vs.)

FAIRY BELL IRVING, ANDREW IRVING,)
A/K/A ANDREW ERVING, ALFONZO IRVING,)
A/K/A ALFONZO ERVING, JOHN D. IRVING,)
A/K/A JOHN D. ERVING, WILLIAM T. IRVING,)
A/K/A WILLIAM T. ERVING, ROBERT IRVING,)
SR., A/K/A ROBERT ERVING, SR., SALLY)
MAY MORGAN, F/K/A SALLY MAY IRVING,)
MINNIE LEE BUTLER, F/K/A MINNIE LEE)
IRVING, JOYCE THELMA TAYLOR, F/K/A)
JOYCE THELMA IRVING, MARY IRVING,)
A/K/A MARY ERVING, MAMIE IRVING A/K/A)
MAMIE ERVING, JESSIE INA IRVING, A/K/A)
JESSIE INA ERVING, JULIOUS IRVING, A/K/A)
JULIOUS ERVING, RASHELL IRVING, FAIRY)
MAY IRVING, THELMA IRVING, ANNELL I.)
RAY, JULIOUS IRVING, JR., ALFREDA IRVING,)
THELMA CARTLELE, BENNIE WARREN)
BUTLER And PERSONS CLAIMING ANY)
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HEREIN, ANY UNKNOWN ADULTS BEING A)
CLASS DESIGNATED AS JOHN DOE; AND)
ANY UNKNOWN MINORS OR OTHER)
PERSONS UNDER LEGAL DISABILITY BEING)
A CLASS DESIGNATED AS RICHARD ROE,)
Defendants.)

FILED
2008 JUN 10 PM 4:53
CLERK OF COURT
SALUDA CO. S.C.

COMPLAINT

2008-CP-41-099

The Plaintiff above named, complaining of the Defendants herein, allege that:

1. This is an action for partition and/or sale of the herein referenced property. The property is exclusively in Saluda County, South Carolina, and is described herein below.
2. The Plaintiff is a resident and citizen of Saluda County, South Carolina.

3. The Plaintiff is informed and believes that the Defendants Andre Irving, Alfonzo Irving, John D. Irving, William T. Irving, Robert Irving, Sr., Julius Irving, Sally May Morgan, Minnie Lee Butler, Joyce Thelma Taylor, Mary Irving, Mamie Irving, and Jessie Ina Irving are or were at some time in the past residents and citizens of the Saluda County, South Carolina. All other Defendants whereabouts are unknown and under investigation at this time.

4. The Plaintiff is informed and believes any heirs of the above named Defendants, classed herein as John Doe and Richard Roe, may be residents of any of several States of the United States of America.

5. The subject property is described as follows:

All that certain tract, piece or parcel of land in Saluda County, S.C., containing 110 acres, more or less, as shown by plat made by D.B. Busby, Surveyor, dated November 7, 1917, recorded in Plat Book 1, at page 16, in the Office of the Clerk of Court for Saluda County, S.C.; said lands bounded North by Clouds Creek, across which lies lands now or formerly of Harriet and Robert Householder; East by lands now or formerly of Imperial Casket Co. (Lyndell and Wanda Shealy); South by Old Rugged County Road, across which lies lands now or formerly of Harold Frick; and Southwest by lands now or formerly of Imperial Casket Co. (Lyndell and Wanda Shealy).

This piece of property was originally purchased by David Irving on November 28, 1917.

6. Fairy Bell Irving was married to David Irving prior to 1910. David Irving died intestate on March 7, 1959. A probate file was opened which listed the subject property, but no deed of distribution to the subject property was ever filed in either the Saluda County Probate Office or the Saluda County Clerk of Court's Office. Fairy Bell Irving died intestate after David Irving, but prior to the filing of this complaint and no probate has been found for her estate.

7. Andrew Irving, Sally May Morgan, Minnie Lee Butler, Mary Irving, John D. Irving, Alfonzo Irving, Robert Irving, Sr., Joyce Thelma Taylor, William T. Irving, Mamie Irving, Jessie

Ina Irving, and Julius Irving were the children of David Irving and Fairy Bell Irving. Based on the estate file of David Irving, Julius Irving and Mamie Irving predeceased David Irving.

8. Plaintiff has purchased the following interests from the heirs of David Irving:

a. John D. Irving, son of David Irving passed this life intestate leaving his wife, Vermedia F. Irving, and two children, Melvin Bernard Irving and Annelle Irving Key. By deed recorded in Book 639 at Page 195 at the Saluda County Clerk of Court's Office Vermeda F. Irving conveyed her interests to Plaintiff. By deed recorded in Book 639 at Page 197 at the Saluda County Clerk of Court's Office Melvin Benard Irving conveyed his interests to Plaintiff. By deed recorded in Book 640 at Page 94 at the Saluda County Clerk of Court's Office Annelle Irving Key conveyed her interests to Plaintiff. This would constitute John D. Irving's entire share of the subject property.

b. Thelma J. Irving, daughter of David Irving, married Tom Cartledge. She died testate in Edgefield County, South Carolina. She devised her interest in the subject property to Tom Cartledge, her husband. By deed recorded in Book 806 at Page 229 at the Saluda County Clerk of Court's Office Tom Cartledge conveyed his interests to Plaintiff. This would constitute Thelma J. Irving's entire share of the subject property.

c. William T. Irving, son of David Irving, died in 1991. His interest in the subject property was conveyed by Deed of Distribution to Ella Louise Erving recorded in Book 232 at page 225 in the Office of the Clerk of Court for Saluda County, S.C. By deed recorded in Book 633 at Page 172 at the Saluda County Clerk of Court's Office Ella Louise Erving conveyed her interests to Plaintiff. This would constitute William T. Irving's entire share of the subject property.

d. Robert Irving Sr., son of David Irving, died testate devising all of his property to his wife, Artise L. Irving. By deed recorded in Book 633 at Page 170 at the Saluda

County Clerk of Court's Office Artise L. Irving conveyed her interests to Plaintiff. This would constitute Robert Irving Sr.'s entire share of the subject property.

e. Sally May Irving Morgan, daughter of David Irving, died intestate. Her heirs were Annie Ruthe Smith, Mary E. Eve, Helen Scales, Andrew Coleman Morgan, Thelma Joyce Coutee, Johnny J. Morgan, and Levenia Sapp. By deed recorded in Book 769 at Page 107 at the Saluda County Clerk of Court's Office Annie Ruthe Smith, Mary E. Eve, Helen Scales, Andrew Coleman Morgan, Thelma Joyce Coutee, Johnny J. Morgan, and Levenia Sapp conveyed their interests to Plaintiff. This would constitute Sally May Irving Morgan's entire share of the subject property.

f. Minnie Lee Irving Butler, daughter of David Irving, died leaving Laveda B. Brayboy, Henry C. Butler, Robert Douglas Butler, Vernell B. Chapman, and Bennie Warren Butler as heirs. By deed recorded in Book 664 at Page 215 at the Saluda County Clerk of Court's Office Henry C. Butler and Robert Douglas Butler conveyed their interests to Plaintiff. By deed recorded in Book 752 at Page 128 at the Saluda County Clerk of Court's Office Vernell Butler Chapman and Leveda B. Brayboy conveyed their interests to Plaintiff. This would constitute 4/5 of Minnie Lee Irving Butler's entire share of the subject property leaving 1/5 with Bennie Warren Butler.

9. The property is jointly owned by virtue of intestate life by the Defendants who are all heirs of the estates of David Irving and Fairy Bell Irving and by deed of certain heirs thereof to Plaintiff.

10. The Plaintiff is informed and believes that he is entitled to an Order of Partition and/or Sale.

11. The property is not subject to partition in kind.

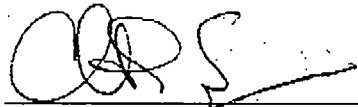
12. The Plaintiff, at his sole expense has paid property taxes on this property for an

extended period of time. The total amount of money expended should be found by the Court. Plaintiff is informed and believes that he should be reimbursed for these expenses from the proceeds of the sale of the property.

13. The Plaintiff is informed and believes that he entitled to an Order of this Court partitioning the property by sale and dividing the net proceeds after payment of any liens, attorney's fees and costs, and reimbursement for his expenses for the taxes, among the parties based on the share of the property then owned by the Plaintiff and Defendants.

14. The Plaintiff is informed and believes that he is entitled to a reasonable sum as an attorney fee, pursuant to the applicable partition statute.

WHEREFORE, Plaintiff prays for an Order of Partition and/or Sale; for a reasonable sum as an attorney's fee; for reimbursement for any funds expended as upkeep of this property and for such other and further relief as the Court might deem just and proper.



Christian G. Spradley
Attorney for the Plaintiff
110 South Main Street
Saluda, South Carolina 29138
(864)445-4544

Saluda, South Carolina

June 9, 2008

EXHIBIT 11

CREEL COURT REPORTING
1230 Richland Street
Columbia, South Carolina 29201
(803) 252-3445

12/6/2011

TAX NO. 57-1016805

INVOICE NO. 11-3149

Attorney for Defendant

Willie B. Heyward, Esquire
Attorney at Law
27 Gamecock Avenue, Suite 200
Charleston, SC 29407

RE: Bobby Jo Clark, As PR of The Estate of	0.00
Richard Clark vs. Fairy Bell Irving, et al.	
C/A No. 08-CP-41-099	
ONE COPY - Motion Hearing before the	0.00
Honorable Kathy O. Rushton on November 15,	
2011:	
Transcript of Hearing	86.95
Postage	5.00
Condensed Transcript/Key Word Index	0.00

COPY
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Return With Payment

We accept:



Total	\$91.95
Payments/Credits	\$0.00
Balance Due	\$91.95

THANK YOU!

/cd

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(803) 252-3445 / (800) 822-0896

STATE OF SOUTH CAROLINA)
)
COUNTY OF SALUDA)

COURT OF COMMON PLEAS
C/A No. 08-CP-41-099

Bobby Jo Clark, As Personal)
Representative Of The Estate)
Of Richard Clark,)

Plaintiff,)

v.)

Fairy Bell Irving, Andrew)
Irving, a/k/a Andrew Erving,)
Alfonzo Irving, a/k/a Alfonzo)
Erving, John D. Erving, a/k/a)
John D. Erving, William T. Irving,)
a/k/a William T. Erving, Robert)
Irving, Sr., a/k/a Robert Erving,)
Sr., Sally May Morgan, f/k/a Sally)
May Irving, Minnie Lee Butler, f/k/a)
Minnie Lee Irving, Joyce Thelma)
Taylor, f/k/a Joyce Thelma Irving,)
Mary Irving, a/k/a Mary Erving,)
Mamie Irving, a/k/a Mamie Erving,)
Jessie Ina Irving, a/k/a Jessie Ina)
Erving, Julious Erving, Rashell)
Irving, Fairy May Irving, Thelma)
Irving, Annell I. Ray, Julious)
Irving, Jr., Alfrda Irving, Thelma)
Cartlele, Bennie Warren Butler)
and Persons Claiming Any Right,)
Title Estate, Interest in or Lien)
Upon The Real Estate Described In)
The Complaint Herein, Any Unknown)
Adults Being a Class Designed as)
John Doe; And Any Unknown Minors)
or Other Persons Under Legal)
Disability Being A Class Designed)
As Richard Roe,)

Defendants.)
-----)

(COPY

MOTION HEARING

Tuesday, November, 15, 2011
11:43 a.m. - 12:26 p.m.

CREEL COURT REPORTING, INC.
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The hearing before the Honorable Kathy O. Rushton, Special Referee for Saluda County, was taken at Saluda County Courthouse, 100 East Main Street, Saluda, South Carolina on the 15th day of November, 2011 before Carla S. Dominick, Court Reporter and Notary Public in and for the State of South Carolina.

APPEARANCES:

Christian G. Spradley, Esquire
MOORE TAYLOR AND THOMAS
110 South Main Street
Saluda, South Carolina 29138
Attorney for the Plaintiff

Willie B. Heyward, Esquire
Attorney at Law
27 Gamecock Avenue, Suite 200
Charleston, South Carolina 29407
Attorney for the Defendant

Henrietta Gill, Esquire
Attorney at Law
Post Office Box 2119
Leesville, South Carolina 29070
Guardian Ad Litem for Unknown Defendants

Also Present:
Bennie W. Butler, Defendant

INDEX

Certificate 37

EXHIBITS

(There were no exhibits marked in this hearing.)

1 **THE COURT:** We're here on the matter of Richard
2 Clark -- well, actually it's been substituted
3 now. Bobbie Jo Clark as personal
4 representative of the estate of Richard Clark
5 versus Fairy Belle Irving and others. It's
6 docket number 2008-CP-41-099. And we have a
7 motion filed by Mr. Heyward on behalf of Thelma
8 Irving. And we will all now hear an argument
9 on that.

10 **MR. HEYWARD:** Thank you, Your Honor. On behalf of
11 Thelma Irving, I move -- I move for relief from
12 the order of sale that's dated June 1st, 2010
13 for the subject property in the case of Richard
14 Clark versus Fairy Belle Irving, et al, case
15 number 2008 common pleas 41-099. In reference
16 to a hearing partition by sale of subject real
17 property located in Saluda County. Hearing was
18 held on April 27th, 2010 before Your Honor, the
19 Honorable Kathy O. Rushton, special referee in
20 this matter. Our basis for relief from the
21 order is based on Section 71-80 South Carolina
22 Rules of Civil Procedure that require all
23 partition actions to be recorded. The
24 testimony at that hearing was offered by the
25 Plaintiff, Richard Clark, who is now deceased.

1 Mr. Clark's wife has been substituted as the
2 Plaintiff in this matter, and she is -- her
3 name is Bobby Jo Clark. Jo is J-O. And she's
4 also the personal representative -- or was the
5 personal representative of the estate --
6 probate estate of her husband, Richard Clark.
7 The testimony at the hearing involved very
8 detailed and extensive evidence of conveyances
9 including deeds -- both quick claim deeds and
10 deeds of distribution. There was also family
11 tree information offered, which resulted in the
12 interests of all of the heirs being determined
13 by the court. And this was done without the
14 benefit of a permanent record at the hearing.
15 We ask that the judgment be set aside, because
16 the judgment is void, and ask that a new
17 hearing be held that is properly transcribed so
18 that there's an accurate record -- accurate
19 contemporaneous record of the proceedings. I
20 move that on -- I make that motion on behalf of
21 my client, Thelma Irving, due to the length of
22 time that the property has been in the family,
23 the Defendant's emotional attachment to the
24 property, and because she is a non-resident of
25 the state of South Carolina, she lives in

1 Illinois, so that she can properly have an
2 opportunity to express whatever objections she
3 may have to the proffered testimony. Thank
4 you.

5 **THE COURT:** Mr. Spradley.

6 **MR. SPRADLEY:** Your Honor, first off, I object to
7 this motion even being heard. One of the
8 requirements under Rule 60(b) -- or under Rule
9 60, period, is that it must be made timely.
10 Within this Rule it doesn't say what timely is.
11 But the order from which is being argued was
12 filed with the court on June the 2nd of 2010.
13 Through my fault, it was not served on Mr.
14 Heyward until February 22nd, 2011 when it was
15 mailed from my office to his office. The
16 motion that we're arguing today was not filed
17 -- from mine it's not even stamp filed, so I
18 don't know when it was filed. But the letter
19 that I was served with it from is dated June
20 15th, which is some three to four months after
21 Mr. Heyward was served with the order. Nothing
22 that Mr. Heyward is arguing or is asking for
23 has changed from February to June and there's
24 no explanation for the lack -- or the time
25 being needed between February and June. Beyond

1 all that, Mr. Heyward is arguing that the
2 order is void. And that's completely
3 impossible. Because under South Carolina law,
4 the definition of void, under voidness
5 provisions from the relief of judgment rule,
6 which is also quoted from the federal rule,
7 which is exactly the same as South Carolina
8 rules, says the rule only encompasses judgments
9 from courts which fail to provide proper due
10 process or judgments from courts which lack
11 subject matter jurisdiction or personal
12 jurisdiction. This court has subject matter
13 jurisdiction. There's no argument. This court
14 has personal jurisdiction. There's no
15 argument. Especially on Mr. Heyward's client,
16 because Mr. Heyward personally accepted service
17 for his client, which subjects him to the
18 personal jurisdiction of this court. So the
19 only possible argument left is a due process
20 argument. Notices were properly sent out.
21 Notices were properly served after the date of
22 the hearing. Beyond all that, Mr. Heyward's
23 client was in default. Months, and months, and
24 months in default. There can be no relief
25 given under the rule because, first off, the

1 motion was not timely, and the -- and the order
2 is not void. It's not even voidable under the
3 rules. Now, I've got two cases that I guess we
4 can put on the record. Belinda MC Company,
5 Incorporated versus Shore --

6 **MR. HEYWARD:** Spell that one.

7 **MR. SPRADLEY:** Hang on. I'll let you -- it's a very
8 strange spelling. I'll show it to you, too.
9 I've never seen that before. And the cite --
10 actually I have two cases. One of them is a
11 court of appeals case. That cite is 653
12 Southeastern 2nd 279, and there's also a
13 supreme court case which is 703 Southeastern
14 2nd at 499. The reason I printed both of these
15 out is that there was a yellow flag on the
16 court of appeals case. The supreme court case
17 has the exact same quote. So that was not the
18 reason for the yellow flag, and that's why I
19 brought both of them so that I can show that.
20 There's no argument of a due process problem
21 here. There's no argument of a personal
22 jurisdiction problem. There's no argument of
23 a subject matter jurisdiction problem.
24 Therefore, Rule 60(b) cannot apply. There's a
25 timeliness issue that we're also objecting to

1 the motion to even be made to start with.
2 Beyond all of that, there's --

3 **THE COURT:** But now --

4 **MR. SPRADLEY:** -- there's some quotations, or some
5 statements that were made about Rule 71(e),
6 that there has to be a recorded transcribed --
7 that is not what Rule 71(e) says. Rule 71(e)
8 does not say there's got to be a court reporter
9 present. Rule 71(e) doesn't say anything about
10 having to be transcribed. All it says is there
11 has to be a record of the case. There's a
12 record of the case. There's an entire file of
13 stuff that was put into evidence and the
14 court's order spells out what the record of the
15 case was, because there was only one witness at
16 that hearing, which was my client, and the
17 court found that what my client was saying was
18 true. So the court's order is a transcript of
19 my client's testimony. And at that hearing all
20 of the defendants were in default. And at that
21 hearing Mr. Heyward was allowed to ask
22 questions. He was allowed more leeway at that
23 hearing than was -- than the law required to
24 have been given him because his client was in
25 default. For all those reasons, this motion

1 has got to be denied. There's no basis for the
2 motion to even have been filed because it's not
3 timely.

4 **THE COURT:** Do you have anything to add?

5 **MS. GILL:** No.

6 **THE COURT:** Do you have anything in rebuttal?

7 **MR. HEYWARD:** I don't have anything in rebuttal.
8 The fact that it also states in the order that
9 I was given an opportunity to participate, I
10 just seem to remember at one point I started to
11 say something and I was told you can't say
12 anything because you're in default. The main
13 reason that it requires a contemporaneous
14 hearing -- a contemporaneous record is that
15 there's an accurate record of what transpired in
16 the hearing. Our memories sometimes fade when
17 we try to reconstruct what's happened in a
18 hearing, and my motion is because, as I stated
19 previously, there was not contemporaneous
20 record made of the hearing of which Mr. Clark
21 proffered evidence and testified.

22 **THE COURT:** Okay. So bottom line, you're saying
23 71(e) says that -- you're saying that we should
24 have had a court reporter, there should have
25 been a transcript, and therefore we should set

1 aside the whole order, and that's based
2 entirely on 71(e); is that correct?

3 MR. HEYWARD: It's based on 71(e) because there was
4 no contemporaneous record made.

5 THE COURT: All right. And you're arguing Rule 60

6 --

7 MR. SPRADLEY: Well, Rule 60 is what's in his
8 motion.

9 MR. HEYWARD: And I asked for --

10 MR. SPRADLEY: The undersigned attorney hereby moves
11 for relief of this order pursuant to South
12 Carolina Rule of Civil Procedure 60(b).

13 MR. HEYWARD: That is correct, because the hearing
14 was not --

15 MR. SPRADLEY: That's the basis of his --

16 MR. HEYWARD: -- conducted as enumerated in Section
17 71(e).

18 MR. SPRADLEY: And just for the record, the order
19 that was written, was written by Ms. Gill. And
20 my memory serves me that that order was sent
21 around to everybody several times before it was
22 ever signed by the court and Mr. Heyward had
23 plenty of time to put in his objections and
24 stuff in that order before it was signed. And
25 I don't remember a single objection to anything

1 in that order back then when it was sent
2 around, because it was emailed to everybody
3 that's sitting in this room except the court
4 reporter and Mr. Williams -- I mean, Mr. Bennie
5 that's sitting over here.

6 **MR. HEYWARD:** And as a rebuttal, this order was --
7 was filed quite a long period of time after the
8 hearing was conducted. So therefore,
9 everything that's in this order would have to
10 have been subject from memory since there's no
11 accurate record of the hearing.

12 **MR. SPRADLEY:** Your Honor, my only point was, he's
13 saying that his memory was that he was not
14 allowed to ask any questions. That he was in
15 default and not allowed to do that. The order
16 was sent to him for his approval before it was
17 signed by the court. He did not say I wasn't
18 allowed to testify or I wasn't allowed to ask
19 questions at that hearing when that order was
20 written. But if his argument is based on
21 71(e), there's no provision in 71(e) to set
22 aside judgment, period.

23 **MR. HEYWARD:** The provision is in 60(b). 71(e) is
24 very clear, Your Honor, that a recording --
25 contemporaneous recording is required.

1 MR. SPRADLEY: Your Honor, I want to read Rule 71(e)
2 into the record. If we're going to do this,
3 we're going to do this. I'm going to come
4 around here with Mr. Heyward so we can read it
5 together so he can tell me if I'm reading it
6 wrong. 71(b), that's the one you're arguing
7 from, right, 71(b)?

8 MS. GILL: It says here 71(e).

9 MR. SPRADLEY: 71(e)? Let me get to the right one.
10 I want to make sure we all --

11 MS. GILL: I mean, that's --

12 MR. SPRADLEY: 71(e). And this last sentence says -
13 - if I'm reading it wrong, let me know.

14 MR. HEYWARD: Uh-huh (affirmative response.)

15 MR. SPRADLEY: "In all such actions, a transcript of
16 record shall be made and preserved in the case
17 file in the office of the clerk of court."

18 MR. HEYWARD: Correct.

19 MR. SPRADLEY: I would argue, Your Honor, that
20 nowhere in this Rule does it say you have to
21 have a contemporaneous recording, or any
22 transcript, or anything else. A transcript of
23 record is recording, writing or otherwise, as
24 to what took place in the hearing. That is
25 what the order is in this case.

1 MR. HEYWARD: Commonsense, as we stand here, Your
2 Honor, of what a transcript is, is one that has
3 been transcribed by a court reporter, and not
4 one that has been assembled at a later time, in
5 this case almost a year after the hearing,
6 without any record of what was said and what
7 was offered into evidence at that hearing.

8 MR. SPRADLEY: Your Honor, the order wasn't written
9 a year after the hearing.

10 MR. HEYWARD: When I was served --

11 MS. GILL: I think it was filed June the 2nd, wasn't
12 it?

13 MR. SPRADLEY: It was filed on June the 2nd of 2010.

14 MR. HEYWARD: And when was that served?

15 MR. SPRADLEY: Being served and when the order was
16 written is two different things. You were
17 served on February the 22nd of 2011.

18 MR. HEYWARD: February 22nd of 2011.

19 MR. SPRADLEY: Yeah.

20 MR. HEYWARD: And when was the hearing?

21 MR. SPRADLEY: The hearing was on April 27th, 2010.

22 MR. HEYWARD: 2010. So that's --

23 MR. SPRADLEY: No, wait a minute. Wait a minute.
24 Is that right?

25 THE COURT: The hearing was April the 27th, 2010.

1 The order was filed June the 2nd, 2010.

2 MR. SPRADLEY: If my memory is correct, the reason
3 for the delay between the hearing and when the
4 order was filed was all the rewrites had to be
5 done because it was written shortly thereafter.
6 I wrote it, and then the court decided to let
7 Ms. Gill write it, and there was emails going
8 --

9 MR. HEYWARD: Well, I wasn't privy to the writing of
10 the order. What I'm -- what my position is,
11 that the hearing was almost a year hence, and
12 therefore --

13 MR. SPRADLEY: A year hence of what?

14 MS. GILL: But we said -- we're saying --

15 MR. HEYWARD: Of the hearing.

16 MR. SPRADLEY: The hearing was in April. The order
17 was filed in June.

18 MR. HEYWARD: When did I get the order? Did I come
19 up here to Saluda to look at the order when it
20 was filed, or somebody sent me --

21 MS. GILL: It was emailed --

22 MR. SPRADLEY: It was served on you in February, and
23 you were sent a copy of it.

24 MR. HEYWARD: When was I served with the order?

25 MR. SPRADLEY: February of 2011.

1 MR. HEYWARD: Okay. When was the hearing? Was the
2 hearing in 2011?

3 MR. SPRADLEY: I don't understand -- I'm going to
4 object. That has nothing to do with what we're
5 here for.

6 THE COURT: I don't think that -- I don't think that
7 really matters at this point in time, because
8 the order had been emailed. The proposed order
9 had been emailed. You had given your
10 responses, which I have printed out your
11 responses to the proposed order. Some of those
12 -- the responses were addressed in the order.
13 They were addressed in the order itself, and it
14 was emailed back and forth --

15 MR. HEYWARD: But it's -- go ahead.

16 THE COURT: -- and granted, the order should have
17 been served on you in a timely manner. This
18 day with email and everything else, I think we
19 attorneys tend to get sometimes a little slack
20 with making sure that that order is actually
21 mailed. But -- and I guess that was a delay in
22 actually mailing it.

23 MR. SPRADLEY: My fault.

24 THE COURT: And Mr. Spradley takes responsibility
25 for that. Nonetheless, you knew what was

1 forthcoming. And when you filed your notice of
2 appeal, you attempted to file that in a timely
3 manner. So, I mean, you were not -- your
4 client was not prejudiced in that sense because
5 nothing had been done. Nothing had been done,
6 other than the fact that there was supposed to
7 be an appraisal done within 45 days, I believe,
8 of the hearing, in which that was done... Okay?

9 **MR. SPRADLEY:** That was done.

10 **THE COURT:** Now, getting back to setting aside this
11 order. We cannot go beyond what happened at
12 that initial hearing whereby you showed up.
13 You were in default. Your client had been
14 given an opportunity, she -- even though she
15 was in default, she had been notified of the
16 hearing 20 days prior to the actual hearing,
17 that she had time that she could make
18 arrangements. If this property were that
19 important, that she could have made
20 arrangements to come to Saluda for the hearing.
21 We cannot accommodate 55 different people. A
22 notice had been published in the newspaper as
23 to the time of the hearing. It was -- it was
24 done. Now, you said that you didn't have a
25 chance to question. That was addressed in the

1 order. All of that was set forth. The only
2 thing -- the only thing that was not done was
3 that we did not have a tape recording of the
4 proceedings. That being said, the order
5 addressed and even talked about testimony,
6 which many orders do not include that kind of
7 language. But it says that Mr. Heyward further
8 complained he was not given the opportunity to
9 present evidence. When you are in default and
10 a client -- a plaintiff has moved forward to
11 take the steps to have a hearing, and there
12 have been no defenses offered, no
13 counterclaims, no defenses, no corrections, all
14 you can do is go forward on what you have to
15 deem as being admitted. And that was what we
16 were doing that particular day. So it was
17 deemed to be admitted. All the parties had
18 been served. Ms. Gill represented those that
19 could not be personally served or notified.
20 She did an outstanding job in her research in
21 trying to locate and assisting with the family
22 tree to make sure it was accurate. She went
23 far beyond even what Mr. Spradley had done in
24 ascertaining the heirs. Everybody had an
25 opportunity to come to court. That's why we

1 have a day in court. But we cannot keep having
2 another day in court, and another day in court,
3 and another day in court, to go over the same
4 thing that has been established. Mr. Clark had
5 a written affidavit as to how he came about the
6 property. And it's detailed in the order the
7 testimony that he offered as to the heirs. And
8 Ms. Gill's further knowledge and investigation
9 into the matter is detailed in the order.
10 Setting aside this order is only going to delay
11 it again, so that there's even more cost
12 incurred to all of these heirs for a
13 publication notice, for a service notice, for
14 legal fees, and it's just delaying the
15 inevitable that the property will be sold. Ms.
16 Irving has had ample opportunity, if she were
17 not satisfied with your services because you
18 did not file an answer on her behalf, then that
19 is a grievance that she can have with you, but
20 not with the court for having -- and not with
21 the plaintiffs for having done everything that
22 he was supposed to do. Nobody has been denied
23 due process. Everyone has had an opportunity
24 to come before the court and present evidence.
25 So your motion is denied.

1 MR. HEYWARD: I think Mr. Spradley had a motion.

2 MR. SPRADLEY: Yes, thank you. My motion is a very
3 simple motion. There was an appeal filed with
4 the Saluda County Clerk of Court's office by
5 Mr. Heyward back in February, I believe it was.
6 And I've got a copy of my motion, if the court
7 doesn't have it, right here.

8 THE COURT: To dismiss the appeal.

9 MR. SPRADLEY: To dismiss the appeal.

10 THE COURT: I apologize.

11 MR. SPRADLEY: I was waiting on a time schedule to
12 be sent out from the court of appeals as to
13 when initial briefs and all that were to be
14 filed and never got one, and ended up calling
15 the court of appeals. And it appeared that Mr.
16 Heyward never filed that appeal with the court
17 of appeals. There was a document filed in the
18 clerk's office here which stayed the action,
19 but there was never a -- a notice in the court
20 of appeals that they were served with notice of
21 appeal. And I've got a letter here -- I
22 finally argued with them enough and told them
23 that I had to have a -- something in writing
24 from them saying that nothing had been filed,
25 and I've got a letter here dated August the

1 12th of 2011 from Claire Allen, who is Deputy
2 Clerk for the South Carolina Court of Appeals
3 that says, "I'm writing this letter as
4 confirmation of our telephone conversation
5 between you and a member of my staff regarding
6 this matter. As of the date of this letter, we
7 have not received a notice of appeal for case
8 number 2008-CP-41-00099. If you'd like to
9 discuss this matter further, please do not
10 hesitate to call this office." And that is the
11 case number for the case before the court. My
12 only reason in making this motion is to clear
13 up the record that there was not an appeal
14 properly filed, so that we can move forward
15 with this action and move forward with the sale
16 of the property.

17 **MR. HEYWARD:** And my response to that is that is
18 that there was no appeal. There was no appeal.
19 There was never an appeal filed with the court
20 of appeals.

21 **MR. SPRADLEY:** And so, then, I would just like to
22 put an order in the file saying there was never
23 an appeal filed. That way if somebody ever
24 looks back at this case, it's clear -- because
25 right now it appears there was one filed

1 because of the notice in the clerk's office
2 here.

3 **THE COURT:** Okay. That's fine. Will you draft an
4 order. --

5 **MR. SPRADLEY:** I'll draft an order. And I'll -- I
6 may file this with the order as an exhibit or
7 whatever. It's the only copy I've got. But I
8 don't know if anybody's got an objection to it.
9 Because I don't think it's an issue. I think
10 everybody understands that an appeal wasn't
11 filed correctly.

12 **MR. HEYWARD:** And I stated in my response that --

13 **MR. SPRADLEY:** Right.

14 **MR. HEYWARD:** -- that the -- that there was never an
15 appeal filed, because it requires a filing with
16 the appellate court also.

17 **MR. SPRADLEY:** And what I'll do is I'll just attach
18 a copy of this to the order. A copy of this
19 letter.

20 **THE COURT:** The original.

21 **MR. SPRADLEY:** The original, and I'll send copies to
22 everybody.

23 **THE COURT:** All right. Thank you.

24 (Off the Record)

25 **MR. HEYWARD:** There was an appraisal done on this

1 property, I believe, at Mr. Spradley's
2 direction that had, one, a value. There was
3 also an appraisal done at the behest of my
4 client, and I believe it had a differing value.
5 Is Your Honor going to address the requirement
6 that the value on the property be based upon
7 what evidence, so that there's an order as to
8 the value of the property?

9 **THE COURT:** In other words, you're saying that in
10 case your client wants to deposit her payment
11 for the -- if she wants to buy the property,
12 you want to know how much she has to deposit
13 with the court; is that correct?

14 **MR. HEYWARD:** That is.

15 **THE COURT:** Within the 45 days, I believe -- I
16 believe it's 45 days that she would have to
17 deposit her money.

18 **MR. HEYWARD:** That is correct.

19 **MR. SPRADLEY:** Forty-five days from February. The
20 time has passed.

21 **MR. HEYWARD:** I'm simply asking. Is the court --

22 **THE COURT:** What I was going to say in addressing
23 that -- I was trying to find out why you wanted
24 to know. But what I was going to say is that
25 it was agreed upon that Holsteen, I believe

1 was his name, would be doing the appraisal.
2 You agreed to that on behalf of your client on
3 that day. The appraisal was brought to me in
4 a timely manner in accordance with what had
5 been agreed upon.

6 **MR. HEYWARD:** That appraisal was done on behalf of
7 the plaintiff. I had no objection to the
8 appraiser. I didn't contribute to the cost of
9 that appraiser. That appraisal was borne by
10 the plaintiff.

11 **MR. SPRADLEY:** It was borne by everybody. It was
12 borne by everybody in the case.

13 **THE COURT:** The parties thereupon --

14 **MR. HEYWARD:** We had --

15 **THE COURT:** -- agreed upon an appraiser. And after
16 the appraisal was done the defendants would
17 have 45 days to pay into court the price set as
18 the value of those interests to be purchased.

19 **MR. HEYWARD:** And Your Honor is reading from the
20 order.

21 **THE COURT:** I'm reading from the order. And the
22 parties further agree that a sale can be
23 conducted by public auction or private sale by
24 way of sealed bids. There was nothing ever
25 mentioned that you wanted a separate appraisal

1 done on behalf of your client.

2 MR. HEYWARD: Is Your Honor going to consider the
3 appraisal done by my client?

4 THE COURT: No. Because even in your taking -- just
5 giving your -- you and your client, the
6 broadest, broadest stretch, your response to
7 the proposed order, you did not even address
8 the fact that you wanted a different appraiser.
9 You wanted someone else to come along and
10 appraise the property.

11 MR. HEYWARD: I have no objection to Mr. Spradley's
12 appraiser.

13 THE COURT: Right. And so, that was set. And the
14 appraised value was set.

15 MR. HEYWARD: Is Your Honor going to --

16 MR. SPRADLEY: Your Honor, this --

17 THE COURT: She had 45 days -- she had 45 days to
18 deposit her money if she wanted to buy this
19 property.

20 MR. HEYWARD: And so, the answer is no, that you're
21 not going to make a determination as to --

22 THE COURT: The appraised value --

23 MR. HEYWARD: -- of how you came to the value of the
24 property?

25 MR. SPRADLEY: I will help out. The court --

1 THE COURT: Thank you, Mr. Spradley.

2 MR. SPRADLEY: The court can set the price of this
3 property at whatever the court wants to set it
4 at, because the time period for Mr. Heyward's
5 claim to come in and put the money in at the
6 very latest would have been 45 days from when
7 he was served with the order in February.

8 MR. HEYWARD: The value --

9 MR. SPRADLEY: So it doesn't matter what the value
10 of the property is?

11 MR. HEYWARD: Yes, it is, Your Honor. How are you
12 going to know what she's supposed to put in if
13 you don't have a value?

14 MR. SPRADLEY: Because you never filed a motion to
15 do it. It's upon you to file a motion saying
16 we don't agree with the appraisal, which has
17 never happened in this case. All you did was
18 go and got another appraisal on your own.
19 There is no motion ever filed with this court
20 to ask for the court to set aside the appraisal
21 that I got. So how was I supposed to know that
22 you didn't agree with the appraisal? And even
23 if that's true, the time limit for your client
24 to file that motion -- Your Honor, I'll speak
25 to the court, was within 45 days of being

1 served with the order. We're almost nine
2 months past that date.

3 **THE COURT:** I have to agree with Mr. Spradley
4 because no motion was ever filed. You -- you
5 sent out a fax --

6 **MR. HEYWARD:** No motion was required under the
7 statute, Your Honor.

8 **THE COURT:** To what statute are you --

9 **MR. HEYWARD:** What I'm asking --

10 **THE COURT:** -- to what statute are you referring?

11 **MR. SPRADLEY:** What statute?

12 **MR. HEYWARD:** What's the 15 -- may I refer to this?

13 **MR. SPRADLEY:** We should probably go off the record
14 for a second, because it's going to take me a
15 second to get to it.

16 **THE COURT:** Which, by the way, even in your fax it
17 says that you would forward the complete
18 appraisal for my review --

19 **MR. HEYWARD:** Right.

20 **THE COURT:** -- as you receive it. I never received
21 one. I don't know whether you ever received
22 one.

23 **MR. HEYWARD:** We have one. We have to mail it
24 because it was not paid.

25 **THE COURT:** Okay. Well, I never received it.

1 MR. HEYWARD: That's why I'm asking is Your Honor --

2 THE COURT: No. We cannot keep -- we cannot keep
3 dillydallying over this. I mean, we need to
4 move forward.

5 MR. HEYWARD: Well, Your Honor may consider it
6 dillydallying, but the statute is fairly
7 explicit as to the procedure. Is Your Honor
8 going to consider anything else besides the
9 plaintiff's appraisal in the determining the
10 value of the property?

11 THE COURT: At this point in time, because, Mr.
12 Heyward, you were present and you agreed with
13 Mr. Spradley, and I guess Ms. Gill had no
14 objections, that Holsteen, who did a lot of
15 appraisals in the area, that is the appraiser
16 that would be used. You had no objections --

17 MR. HEYWARD: I had no objection --

18 MR. SPRADLEY: Your Honor --

19 THE COURT: And you had no objections when you sent
20 your objections to the order. That was not
21 included.

22 MR. SPRADLEY: Section 15-61-25, "Right of first
23 refusal of joint tenant or tenant in common to
24 purchase property prior to partition
25 procedure." Subsection C, "In the event that

1 the partitioning joint tenant, or tenants in
2 common, object to the value of the interest as
3 determined by the appointed appraisers, those
4 joint tenants, or tenants in common, shall have
5 10 days from the date of the filing of the
6 report to file a written notice of objection to
7 the report and request a hearing before the
8 court on the value. An evidentiary hearing
9 limited to the proposed valuation of the
10 interest of the partitioning joint tenants, or
11 tenants in common, shall be conducted and an
12 order as to the valuation of the interest of
13 the partitioning joint tenants or tenants in
14 common shall be issued." There has never been
15 anything filed with this court questioning the
16 valuation of the property.

17 **THE COURT:** Now, Mr. Spradley, I will say that he
18 did send us that fax, but he has never
19 requested a hearing. Never have you requested
20 a hearing for the sole determination of the
21 value.

22 **MR. HEYWARD:** Right. But did, Your Honor receive
23 the fax with a fairly large discrepancy in the
24 value?

25 **THE COURT:** The court did receive this. However, it

1 was sent to -- and here again, Ms. Gill was not
2 privy to this. It was sent to Chris Spradley
3 and myself via fax, and you also indicated that
4 you would send the full appraisal when you
5 received it. You have here again, on the
6 record, acknowledged that you received the
7 appraisal but you never mailed it. You've
8 never requested a hearing. What else -- what
9 else can we do if we're going by the statute?

10 **MR. HEYWARD:** What I'm asking is that the only
11 factor that the court is using in determining
12 the value of the property is the appraisal done
13 by Ms. Smith.

14 **MR. SPRADLEY:** The appraisal that was done by order
15 of the court by the agreement of me and you at
16 that hearing.

17 **THE COURT:** In other words, if at this point in time
18 -- and I understand there might be people that
19 are interested in this property, and if they're
20 willing to pay the \$264,000, then it will
21 certainly be sold for the 264,000. I'm
22 assuming it will be, if anyone is willing to
23 pay that much.

24 **MR. SPRADLEY:** And I'll go ahead and put on the
25 record that I have people calling me at least

1 on a monthly basis asking me when this property
2 is going to be up for sale. So there's going
3 to be people interested in it. And I would
4 suspect that -- I'll go ahead and put on the
5 record what my plans were. My plans were to
6 do a sealed bid. And if the bids didn't come
7 in near the appraisal that Mr. Holsteen did,
8 then we would have to turn around and do a sale
9 on the courthouse steps, because I was going to
10 -- because my job is to try to get the most
11 that I can for everybody.

12 **THE COURT:** Is Mr. Hayward's appraisal less or more?

13 **MR. HEYWARD:** Less. Quite a bit less.

14 **THE COURT:** A hundred and sixty thousand --

15 **MR. SPRADLEY:** It's \$1,000 less.

16 **THE COURT:** -- compared to 264,000.

17 **MR. HEYWARD:** A hundred thousand.

18 **THE COURT:** He's putting it at about 1,500 an acre,
19 I guess; is that right? But nonetheless, as of
20 this point, Mr. Spradley may proceed with
21 taking sealed bids. If it's anywhere close to
22 the 264,000, I'm assuming it can be sold.

23 **MR. HEYWARD:** And is the court going to consider
24 putting the property -- listing the property
25 with a licensed real estate broker?

1 THE COURT: If the bids do not come up then -- the
2 order says public or private sale, and then
3 there's going to be a supplemental hearing
4 afterwards to --

5 MR. SPRADLEY: I'll be glad to take any ideas you
6 have how to maximize the value. Because
7 that's what -- at this point that's what I'm
8 going to do, is try to maximize the most that
9 we can get for everybody, because everybody
10 wants that.

11 MR. HEYWARD: Well, my position is still the same on
12 that. I'm just concerned from the beginning
13 that my client was not offered due process in
14 this, because I never got an affidavit of
15 default. I never knew I was in default until
16 I got the notice of hearing. Also, assertions
17 in the order, I've made -- I've disagreed and
18 made that known in writing to a few of them,
19 but as far as me remembering exactly what
20 happened at the hearing without a
21 contemporaneous record for me is impossible.
22 I can remember some of the highlights, and some
23 of the things that concerned me and some of the
24 things that I had in my notes. The motion that
25 I offer was that the order be set aside. We

1 have another hearing. Even offered to
2 participate in some of the court's concerns of
3 a cost. The evidence presented at the prior
4 hearing was both verbal, as far as the
5 plaintiff's contention that the property was
6 incapable of being partitioned in kind, I think
7 was very important. There was also documents
8 presented --

9 **THE COURT:** Mr. Heyward --

10 **MR. HEYWARD:** If I may, Your Honor.

11 **THE COURT:** -- I've got to cut you off on that.
12 Because what you're trying to do now is you're
13 trying to present a lot of defenses to the
14 complaint. You're trying to do responsive
15 pleadings to the complaint that you never
16 answered. And had you --

17 **MR. HEYWARD:** You mean the order, Your Honor?

18 **THE COURT:** No. I'm talking about the complaint.

19 **MR. HEYWARD:** Yes.

20 **THE COURT:** Because the complaint addressed the
21 issues that were going to be brought before
22 this court. Then when you came along and you
23 had not presented anything to contradict what
24 was in the complaint, Mr. Spradley had no way
25 of preparing other than to assume that

1 everything was as he had put in the complaint.

2 MR. HEYWARD: I cannot speak for my client.

3 THE COURT: But your client could have been there.

4 And that's the whole fact.

5 MR. HEYWARD: My clients did not have the
6 opportunity, and I asked for a continuance on
7 their behalf.

8 THE COURT: Well, but 20 days is plenty of notice
9 for anyone to come from Chicago that is that
10 interested in coming. I mean, I -- I believe
11 that -- that this court, and the Guardian-Ad-
12 Litem, and Mr. Spradley both, we all tried to
13 accommodate anything, but you didn't have
14 anything to offer. They were willing to make
15 sure everything was right.

16 MR. HEYWARD: I cannot testify on behalf of my
17 client, Your Honor.

18 THE COURT: Because your client was not here, and
19 she was provided notice.

20 MR. SPRADLEY: Your Honor, just -- I feel like
21 there's some things I need to clear up because
22 of all this that was just said. An affidavit
23 of default was filed November 2010.

24 THE COURT: It was filed. His complaint is that it
25 was not served. And I'm not sure that the

1 rules --

2 **MR. SPRADLEY:** Under the rules, when somebody is in
3 default is not entitled to service of any
4 further pleadings.

5 **THE COURT:** That's my understanding.

6 **MR. SPRADLEY:** The second part is that by his own
7 motion, his client, through him, was served
8 with notice of the hearing, which was also the
9 notice of right to purchase the property. It
10 may have been on April the 5th, 2010, and is
11 the statutorily required notice that the person
12 is entitled to purchase the property and that
13 a hearing was going to be held on April 27th,
14 2010 at 10:00. It was mailed on April the 5th.
15 His motion -- his motion to set aside was filed
16 -- or his letter back to the court was dated
17 April the 7th. Two days later. So it was more
18 than 20 days between Mr. Heyward being noticed
19 of the hearing and when the hearing was had.
20 My purpose in arguing against the continuance
21 was all the funds that had been expended to put
22 the notice in the paper and serve everybody in
23 this case with that notice, because everybody
24 was properly served. We even put it in the
25 newspaper to cover the people that we couldn't

1 find to serve, and the unknowns, through Ms.
2 Gill. That was funds that were expended that
3 were Mr. Heyward's client's monies funds.
4 Every dime that gets spent is split among
5 everybody that takes from this case, and my job
6 is to make sure that I maximize the money that
7 goes to everybody in this case, including Mr.
8 Heyward's client.

9 **MR. HEYWARD:** And I think Mr. Spradley for his --.
10 But the -- my position is -- my position is
11 clear as far as being notified. I don't
12 practice in Saluda. All I was asking for, and
13 I expected, and maybe my expectations were
14 wrong, that at least some accommodation would
15 be accorded me so that I could keep up with the
16 progress of this case. I was not even served
17 with the notice that Your Honor was appointed
18 as the special referee.

19 **THE COURT:** You were in default. And it's my
20 understanding that the Charleston master is a
21 lot stricter than we have been. And as far as
22 expecting the courtesy, what you've got to
23 understand is that Ms. Irving was not the only
24 defendant.

25 **MR. HEYWARD:** Absolutely.

1 THE COURT: And as stated, the expense having to
2 publish -- what if somebody else called and
3 said I want a continuance because I can't come
4 from Philadelphia. When do we ever have a
5 hearing? So the fact that it wasn't that you
6 didn't get but one day's notice. The fact is
7 she had 20 days notice, by your own admission
8 in the file. Therefore, you know, I see where
9 there was no prejudice to your client. She
10 could have come and she chose not to. She
11 chose to let you come without her. Mr.
12 Spradley, prepare an order.

13 MR. SPRADLEY: Yes, ma'am.

14 MR. HEYWARD: Thank you, Your Honor.

15 THE COURT: And please run it by Mr. Heyward and Ms.
16 Gill.

17 MR. SPRADLEY: I will.

18 MR. HEYWARD: That would be nice.

19 (The hearing concluded at 12:26 p.m.)
20
21
22
23
24
25

CERTIFICATE

This is to certify that the within Motion Hearing consisting of Thirty-Six (36) pages, is a true and correct transcript of the testimony given; said hearing was reported by the method of Stenomask with Backup.

I further certify that I am neither employed by nor related to any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal on December 5, 2011.



Carla S. Dominick
Court Reporter

Notary Public for South Carolina
My Commission Expires: 5/8/2012

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657 S.E.2d 743 (S.C. 2008)

376 S.C. 467

Donna MOORE, Respondent,

v.

Lance MOORE, Jr., Appellant.

No. 26429.

Supreme Court of South Carolina.

February 11, 2008

Heard Nov. 15, 2007.

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Gregory Samuel Forman , of Charleston, and Norbert E. Cummings, Jr. , of Cummings Law Firm, of Summerville, for Appellant.

Anthony P. LaMantia, III , Allison J. LaMantia, of LaMantia Law Firm, and Mary Kathryn Schmutz, all of Charleston, for Respondent.

Assistant Attorney General Warren V. Ganjehsani , of Columbia, for Amicus Curiae.

Justice BEATTY .

[376 S.C. 469] In this direct appeal, Lance Moore, Jr. (Husband) appeals the family court's decision entering an Order of Protection from domestic abuse in favor of Donna Moore (Wife). Husband challenges the court's decision and underlying statutory

[376 S.C. 470] authority based on due process and equal protection grounds. We affirm as modified.

FACTUAL/PROCEDURAL HISTORY

On October 1, 2006, officers with the Mount Pleasant Police Department were summoned to the Moores' home after 911 personnel received a call from the Moores' fifteen-year-old son. The parties' son reported that Husband had become physically abusive with him and his mother and threatened them with a weapon. Police arrested Husband and charged him with criminal domestic

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violence (CDV). The next day, Husband was released on

bond and ordered not to go near the Moores' residence. According to Wife, Husband drove by the residence and at one point entered the yard to remove several items. On October 3, 2006, Wife filed an action pursuant to section 20-4-50 [1] of the "Protection from Domestic Abuse Act" (the Act) requesting an emergency hearing and an Order of Protection against Husband. At 7:50 p.m. on October 4, 2006, Husband was served in Sumter with a summons to appear for an emergency hearing scheduled for 9:00 a.m. on October 5, 2006, in Charleston.

At the hearing, Husband and Wife both appeared without counsel. Initially, the family court judge inquired whether Wife wanted a continuance in order to obtain counsel. Wife declined, stating that she wanted to obtain an immediate restraining order against Husband. When Husband requested a continuance so that he could obtain counsel, the judge denied the request, and stated "[t]his is an Emergency Hearing, [Wife] doesn't want to continue this case, we got to go forward today." Throughout the proceeding, Husband reluctantly responded to the judge's questions and indicated that he did not want to proceed without the assistance of counsel.

[376 S.C. 471] After hearing Wife's testimony and questioning the parties, the judge found Husband had abused Wife and their son. As a result, the judge issued an Order of Protection which, *inter alia*: restrained Husband from committing any further abuse or from having any contact with Wife and the parties' two minor children; awarded Wife temporary custody of the parties' children; ordered Husband to pay temporary child and spousal support; and awarded Wife temporary possession of the marital home. In addition to ordering CDV counseling and invoking the assistance of the Department of Social Services for the minor children, the judge also ordered Husband to relinquish any weapons in his possession to the Charleston County Sheriff's Department until further order of the family court.

On October 13, 2006, Husband, who was then represented by counsel, filed a motion for reconsideration. The family court judge held a hearing on the motion. At the hearing, Husband's counsel alleged the issuance of the order violated due process and denied him equal protection based on the following grounds: (1) Husband did not receive "ample notice and an opportunity to answer [Wife's] charges" with the assistance of counsel; and (2) Husband's request for a continuance was denied whereas Wife was offered a continuance to retain counsel. In making these arguments, Husband's counsel claimed the order, specifically the finding of physical abuse, was a final order which could have future ramifications on Husband's employment and his right to possess weapons. Husband also characterized the proceeding under section 20-4-50 (a) as "quasi-criminal" because "it takes away

any citizen's rights without due process without a full trial." Based on these arguments, Husband's counsel requested a full hearing on the merits. Counsel, however, recognized that a Temporary Restraining Order could be granted to protect Wife until a final resolution was reached on all of the issues.

By order dated December 15, 2006, the family court denied Husband's motion for reconsideration. The court found Husband's due process rights were not violated by the short-time frame preceding the emergency hearing given the statute specifically permitted the court to conduct the hearing within twenty-four hours after Wife's petition was served. Additionally, the court held the denial of Husband's motion for a

[376 S.C. 472] continuance did not violate due process because the statute was intended to protect the alleged victim of domestic abuse. Because Wife chose to proceed with the hearing, the court believed that allowing Husband to delay the hearing "would defeat the clear legislative

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intent of the statute which is to provide alleged victims of abuse immediate access to the Court for orders of protection." Finally, the court found Husband's equal protection claim to be without merit. Relying on the terms of the statute, the court found the "Act affords protection for males, females and minor children alike." The court believed that the emergency hearing would not have been conducted differently "if the sexes of the parties were switched." Subsequently, Husband filed this appeal.

I. DUE PROCESS

Husband challenges the issuance of the family court's order on two due process grounds. Given the permanency and collateral consequences inherent in a finding of physical abuse, Husband first contends the provision of section 20-4-50 which permits a hearing within twenty-four hours of the service of the petition violates due process. As a second ground, Husband asserts the family court's denial of his motion for a continuance constituted an abuse of discretion and violated his right to due process. Specifically, he claims the short notice and denial of a continuance prohibited him from procuring counsel.

Although Husband does not differentiate in his argument between substantive and procedural due process, we believe both are implicated in the issues he raises on appeal. Accordingly, both are addressed in our analysis.

No person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3. "In order to prove a denial of substantive due process, a party must show that

he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law." *Sloan v. S.C. Bd. of Physical Therapy Exams*, 370 S.C. 452, 483, 636 S.E.2d 598, 614 (2006) ; see *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (recognizing that before due process

[376 S.C. 473] guarantees are implicated, there must be a deprivation by the government of constitutionally protected interest).

Procedural "[d]ue process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses." *ClearChannel Outdoor v. City of Myrtle Beach*, 372 S.C. 230, 235, 642 S.E.2d 565, 567 (2007) .

In *Sloan v. South Carolina Board of Physical Therapy Examiners*, this Court explained:

Procedural due process requirements are not technical; no particular form of procedure is necessary. *In re Vora*, 354 S.C. at 595, 582 S.E.2d at 416. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Wilson*, 352 S.C. at 452, 574 S.E.2d at 733 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484, 494 (1972)). The requirements in a particular case depend on the importance of the interest involved and the circumstances under which the deprivation may occur. *S.C. Dept. of Soc. Servs. v. Beeks*, 325 S.C. 243, 246, 481 S.E.2d 703, 705 (1997) .

Sloan v. S.C. Bd. of Physical Therapy Exams, 370 S.C. 452, 484, 636 S.E.2d 598, 615 (2006) . " 'Where important decisions turn on questions of fact, due process often requires an opportunity to confront and cross-examine adverse witnesses.' " *S.C. Dep't of Soc. Servs. v. Wilson*, 352 S.C. 445, 452, 574 S.E.2d 730, 734 (2002) (quoting *Brown v. S.C. State Bd. of Educ.*, 301 S.C. 326, 329, 391 S.E.2d 866, 867 (1990)).

Applying the above-outlined analysis to the facts of the instant case, we find Husband's substantive due process rights were implicated by the proceedings established in section 20-4-50 . See *State ex rel. Williams v. Marsh*, 626 S.W.2d 223, 230 (Mo.1982) (*en banc*) (finding property and liberty interests of respondent to a petition for order of protection are implicated and protection of procedural due process is appropriate). Specifically, Husband's constitutionally protected liberty and property interests are subject to temporary deprivation as a result of the issuance of an Order of Protection. Once the order is issued Husband, *i.e.*, a respondent to a petition, is subject to: the immediate loss of his children; reduction in his financial resources if child/spousal support is ordered;

and

[376 S.C. 474] immediate loss of possession of the marital residence.[2] Husband also immediately becomes subject to criminal prosecution or contempt proceedings if he violates the Order of Protection. Additionally, Husband is required to immediately relinquish any weapons in his possession or be subject to federal prosecution pursuant to 18 U.S.C.A. § 922 .[3] If Husband is employed

[376 S.C. 475] in law enforcement, the inability to possess a weapon may impact his ability to perform his job.[4]

Significantly, not only is Husband subject to immediate deprivation of constitutionally protected interests, he may also suffer future ramifications as a consequence of the issuance of the Order of Protection. The factual finding of physical abuse may have a long-term impact on both marital and civil litigation. In terms of marital litigation, a definitive finding of physical abuse could be used by Wife in the following respects: a ground for divorce (physical cruelty); the award of custody; a fault factor for the award of alimony; and a factor to be taken into consideration for the equitable apportionment of the marital assets. Furthermore, a factual finding of physical abuse could potentially be used in a civil claim by Wife for recovery of actual or punitive damages caused by the physical abuse. *See* S.C.Code Ann. § 20-4-130 (1985)("Any proceeding under [the chapter regarding the protection from domestic

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abuse] is in addition to other civil and criminal remedies."). Because Husband's constitutionally protected interests in liberty and property are implicated by the issuance of the Order of Protection, procedural due process protection should be afforded to Husband, *i.e.*, a respondent to a petition.

[376 S.C. 476] Although due process protection is applicable in this situation, it is not without limitation. Nor are a respondent's interests paramount to the State's interest in protecting a petitioner or other household members from domestic abuse. In view of these competing interests, it is necessary for this Court to balance these interests to determine the extent and nature of applicable due process procedures. *See Arnett v. Kennedy*, 416 U.S. 134, 167-68, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974) (noting extent and nature of due process procedures depends upon weighing of the private interests affected and the related government functions). In doing so, we are guided by the intent of the Legislature in promulgating the Act, particularly section 20-4-50 .

Commentators have observed:

The Protection from Domestic Abuse Act was enacted to

deal with the problem of abuse between family members. The effect of the Act was to bring the parties before a judge as quickly as possible to prevent further violence. Speedy access to the courts also [minimizes] the disruption to any children of the parties since the family court may order payment of temporary financial support. By expediting the provision of child support, the Act helps prevent the abused spouse from returning to her abuser based on financial reasons.

17 S.C. Jur. *Criminal Domestic Violence*, § 14 (Supp.2007) .

We agree with this commentary, and believe the Legislature properly effectuated the above goal by creating a statutory scheme that permits expedited proceedings within twenty-four hours from service of the petition before either the family court or, if necessary, before a magistrate who may grant a limited temporary restraining order. *See* S.C.Code § 20-4-30 (A) (Supp.2006) ("The family court has jurisdiction over all proceedings under this chapter except that, during nonbusiness hours or at other times when the court is not in session, the petition may be filed with a magistrate. The magistrate may issue an order of protection granting only the relief provided by Section 20-4-60 (a)(1).").

Furthermore, by providing a respondent with notice of a petition prior to the hearing and an opportunity to be heard, section 20-4-20 complies with the requisite procedural due

[376 S.C. 477] process guarantees. *See* S.C.Code Ann. § 20-4-20 (f) (Supp.2006) (" 'Order of protection' means an order of protection issued to protect the petitioner or minor household members from the abuse of another household member *where the respondent has received notice of the proceedings and has an opportunity to be heard.* ")(emphasis added). Here, Husband was provided notice of the hearing and given an opportunity to actively participate in terms of questioning Wife and answering the court's questions. Husband, however, chose not to participate in the hearing and, thus, failed to take advantage of the procedural safeguards established by the Act.

Additionally, given that relief awarded in an Order of Protection is temporary and potentially modifiable, the procedure established by the Legislature is sufficient to comply with procedural due process. Finally, as evident in this case, a respondent may obtain counsel after the hearing in order to move for reconsideration or seek modification of certain relief awarded to petitioner. *See State ex rel. Williams v. Marsh*, 626 S.W.2d 223, 230 (Mo.1982) (*en banc*) ("Notice and an opportunity to be heard must be provided by the state in a meaningful manner prior to deprivation of a protected interest. This rule is not necessarily applied when there is a temporary taking, as is the case here. Due process is a flexible concept.") (citations omitted); *see also State v. Doe*, 46 Conn.Supp. 598, 765 A.2d 518, 523-29 (2000)

(concluding defendant had not been prejudiced by issuance of initial protective order without an attorney where he had the order modified with the aid of counsel).

Notably, appellate courts from other jurisdictions have held that statutes similar to

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this state's Protection from Domestic Abuse Act are not violative of due process. *See, e.g., Paschal v. Hazlinsky*, 803 So.2d 413, 417-19 (La.Ct.App.2001) (holding no due process violation with respect to hearings for protective orders against domestic abuse); *Kampf v. Kampf*, 237 Mich.App. 377, 603 N.W.2d 295, 299 (1999) (concluding Wife's obtaining personal protection order without notice to Husband did not violate his procedural due process rights); *Baker v. Baker*, 494 N.W.2d 282, 288-89 n. 9 (Minn.1992), *superseded in part by statute* in *Burkstrand v. Burkstrand*, 632 N.W.2d 206 (Minn.2001) (relying on guidance of cases from other jurisdictions and finding ex parte procedures of Domestic Abuse Act

[376 S.C. 478] comply with applicable rules as well as due process); *Schramek v. Bohren*, 145 Wis.2d 695, 429 N.W.2d 501, 503-05 (1988) (finding spousal abuse statute was not unconstitutional).

Even though Husband's procedural due process rights were not violated by the short-time period between service of the petition and the hearing or Husband's inability to procure counsel for the emergency hearing, we are concerned that a factual finding of physical abuse was finally adjudicated at this emergency hearing.

Without question, the immediate protection of potential victims from domestic abuse is a legitimate government interest which requires a prompt hearing and issuance of a temporary order if the evidence necessitates. However, we believe a definitive factual finding of physical abuse for a temporary Order of Protection is not only improper under the terms of the statute, but is also unnecessary to satisfy the government's interest. In our view, the Legislature provided for an emergency hearing, for the benefit of victims of domestic violence and did not intend for these protections to establish collateral consequences for the alleged abuser. *Cf. State v. Dispoto*, 189 N.J. 108, 913 A.2d 791, 798 (2007) (stating "the remedial protections afforded under the [New Jersey Protection of Domestic Violence Act] are intended for the benefit of victims of domestic violence and are not meant to serve as a pretext for obtaining information to advance a criminal investigation against an alleged abuser"). Instead, we believe the Legislature intended for the findings, which result from an emergency hearing pursuant to section 20-4-50 (a), to be temporary and confined to the Order of Protection. Implicit in this conclusion is that these findings cannot be used in future litigation unless they

are confirmed in a subsequent hearing on the merits.

In reaching this conclusion, we need look no further than the terms of the Act. *See Beattie v. Aiken County Dep't of Soc. Servs.*, 319 S.C. 449, 452, 462 S.E.2d 276, 278 (1995) (recognizing that in interpreting a statute, our primary purpose is to ascertain the intent of the Legislature); *Id.* ("A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." (quoting

[376 S.C. 479] *Browning v. Hartvigsen*, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992)). Specifically, we focus our analysis on the procedural prerequisites for petitioning for an emergency hearing as well as the proof required for the issuance of an Order of Protection.

In terms of procedure, it is significant to note that the Petition for an Order of Protection "must inform the respondent of the right to retain counsel." S.C.Code Ann. § 20-4-40 (c) (Supp.2006). We interpret this requirement to mean that the Legislature intended for a respondent to have a meaningful opportunity to retain counsel in order to participate in a hearing conducted pursuant to the Act. Because section 20-4-50 (a) authorizes a family court to conduct an emergency hearing "[w]ithin twenty-four hours after service of a petition," it would be nonsensical to believe that a respondent would be able to retain counsel and prepare for an adjudicative hearing within such a limited time frame. S.C.Code Ann. § 20-4-50 (a) (Supp.2006). A strict reading of this statutory provision would mean that an emergency hearing could be conducted within mere hours of when a respondent was served with the petition. Clearly, we do not believe the Legislature intended for this result.

Furthermore, we glean additional support for our interpretation by comparing a related provision of section 20-4-50 with the above-

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quoted provision. Subsection (b) of this statute provides:

If the court denies the motion for a twenty-four-hour hearing or such a hearing is not requested, the petitioner may request and the court must grant a hearing within fifteen days of the filing of a petition. The court must cause a copy of the petition to be served upon the respondent at least five days prior to the hearing, except as provided in subsection (a), in the same manner required for service in the circuit courts. Where service is not accomplished five days prior to the hearing, the respondent, upon his motion, is entitled to a continuance until such time is necessary to provide for compliance with this section.

S.C.Code Ann. § 20-4-50 (b) (Supp.2006). The significant difference between the procedures employed

in each of the subsections is that the respondent is given a minimum of five days to obtain counsel and prepare for the hearing and may be

[376 S.C. 480] granted a continuance if the five days are not provided under subsection (b), whereas there is no mention of a continuance if an emergency hearing is conducted under subsection (a). Given that a respondent is not given a meaningful opportunity to retain counsel and prepare if a twenty-four-hour emergency hearing is requested and conducted, we conclude the Legislature intended for the emergency hearing to be temporary in nature. Inferentially, a hearing conducted pursuant to section 20-4-50 (b), which provides a respondent an extended period of time in which to retain counsel and prepare his or her case, should be viewed as an adjudicative hearing on the merits of the action.

A review of the proof required for the issuance of an Order of Protection solidifies our conclusion that an order issued pursuant to a twenty-four-hour emergency hearing is intended to be temporary and not a final determination. For a court to issue an Order of Protection after an emergency hearing, a petitioner must prove the "allegation of abuse by a preponderance of the evidence." S.C.Code Ann. § 20-4-50 (a)(Supp.2006). The statute further provides that "[a] prima facie showing of immediate and present danger of bodily injury, which may be verified by supporting affidavits, constitutes good cause for purposes of this section." *Id.* A review of these statutory prerequisites reveals that a definitive finding of physical abuse is not essential.

Although the Act defines "abuse" to include "physical abuse," "bodily injury," and "assault," it also recognizes that "the threat of physical harm" is sufficient to constitute a basis for the issuance of an Order of Protection as the result of an emergency hearing. S.C.Code Ann. § 20-4-20 (a)(1) (1985 & Supp.2006). Furthermore, in our opinion, a showing of "immediate and present danger of bodily injury" denotes that the threat of a future occurrence provides the basis for an Order of Protection and, thus, a definitive finding of physical abuse is not mandated. Finally, we note that this type of finding would be sufficient to satisfy the provision of 18 U.S.C.A. § 922(g)(8)(C)(i), which only requires "a finding that such person represents a credible threat to the physical safety of such intimate partner or child."

Based on the foregoing, we hold that an Order of Protection issued pursuant to an emergency hearing is temporary and

[376 S.C. 481] that a hearing on the merits of the action should, if necessary, be conducted by the family court at a later date.[5] This procedure would then enable a petitioner and a respondent to procure counsel in order to actively and thoroughly participate in an adjudicative hearing on the merits of the action.[6]

II. EQUAL PROTECTION

Finally, Husband claims the family court engaged in "invidious gender discrimination" by denying his motion for a continuance but offering Wife a continuance in order to provide her with more time to prepare or seek counsel.

As we understand this argument, Husband is primarily challenging the family court's decision not to grant a continuance as opposed to positing an argument that the Act violates the Equal Protection Clause. Thus, this argument is not in actuality an equal protection challenge. However, to the extent Husband's argument can be construed as such a challenge, we find this issue is without merit.

The Equal Protection Clauses of our federal and state constitutions declare that no person shall be denied the equal protection of the laws. U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3. Equal protection requires "all persons to be treated alike under like circumstances and conditions, both in privileges conferred and liabilities imposed." *GTE Sprint Commc'ns Corp. v. Pub. Serv. Comm'n of South Carolina*, 288 S.C. 174, 181, 341 S.E.2d 126, 129 (1986). "Courts generally analyze equal protection challenges under one of three standards: (1) rational basis; (2) intermediate scrutiny;

[376 S.C. 482] or, (3) strict scrutiny." *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004). "Gender-based classifications are not inherently suspect so as to be subject to strict scrutiny and will be upheld if they bear a fair and substantial relationship to legitimate state ends." *In the Interest of Joseph T.*, 312 S.C. 15, 16, 430 S.E.2d 523, 524 (1993). "For a gender-based classification to pass constitutional muster, it must serve an important governmental objective and be substantially related to the achievement of that objective." *State v. Wright*, 349 S.C. 310, 313, 563 S.E.2d 311, 312 (2002) (citing *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976)). "A law will be upheld where the gender classification realistically reflects the fact that the sexes are not similarly situated in certain circumstances." *Id.*

In the instant case, the family court judge did not base her decision on gender, but rather on the respective posture of the parties, *i.e.*, that Wife was the "petitioner" and had the burden of establishing the need for an Order of Protection. As defined by section 20-4-20, a "[p]etitioner" means the *person* alleging abuse in a petition for an order of protection." S.C.Code Ann. § 20-4-20 (d) (1985) (emphasis added). A review of the quoted text as well the rest of the definitional section of the Act, reveals that the statute clearly utilizes the word "person," a non-gender specific term, to define the parties to an action for an Order of Protection. S.C.Code Ann. § 20-4-20 (b), (d), & (e) (1985). Thus, there is no gender-based

classification that would implicate a violation of the Equal Protection Clause. *See State v. Doe*, 46 Conn.Supp. 598, 765 A.2d 518, 523-27 (2000) (holding statutory classification of victim and a defendant involved in issuance of a protective order did not violate defendant's equal protection rights).

Furthermore, to the extent Husband attacks the family court's decision to deny his motion for a continuance, we find the family court did not abuse its discretion. *See Bridwell v. Bridwell*, 279 S.C. 111, 112, 302 S.E.2d 856, 858 (1983) (stating the grant or denial of a continuance is within the sound discretion of the trial judge and is reviewable on appeal only when an abuse of discretion appears from the record). Because, as previously discussed, Husband was provided with procedural due process at the hearing, we disagree with

[376 S.C. 483] Husband's contention that he was entitled to a continuance. Moreover, Husband subsequently retained counsel and was permitted to move for reconsideration of the order. Accordingly, Husband was not prejudiced by going forward with the emergency hearing. *Townsend v. Townsend*, 323 S.C. 309, 313, 474 S.E.2d 424, 427 (1996) (finding appellate court will not set aside a court's ruling on a motion for a continuance unless it clearly appears there was an abuse of discretion to the prejudice of the movant).

CONCLUSION

Because Husband was provided procedural due process prior to the issuance of the Order of Protection, we affirm the decision of

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the family court. However, we find that an Order of Protection issued pursuant to an emergency hearing is temporary and does not represent a final adjudication of the merits of the action. Applying our decision to the instant case, we hold the finding of physical abuse was not a final adjudication and, therefore, should not be used against Husband in future litigation. Finally, we find neither the Act nor the family court's decision denying Husband a continuance constituted a violation of the Equal Protection Clause.

AFFIRMED AS MODIFIED.

MOORE , A.C.J., WALLER , PLEICONES , JJ.,
and Acting Justice J. ERNEST KINARD, Jr. , concur.

Notes:

[1] Section 20-4-50 provides:

a) Within twenty-four hours after service of a petition under this chapter upon the respondent, the court may, for good cause shown, hold an emergency hearing and

issue an order of protection if the petitioner proves the allegation of abuse by a preponderance of the evidence. A prima facie showing of immediate and present danger of bodily injury, which may be verified by supporting affidavits, constitutes good cause for purposes of this section.

S.C.Code Ann. § 20-4-50 (a) (Supp.2006).

[2] Section 20-4-60 provides in pertinent part:

(c) When the court has, after a hearing for any order of protection, issued an order of protection, it may, in addition:

(1) Award temporary custody and temporary visitation rights with regard to minor children living in the home over whom the parties have custody.

(2) Direct the respondent to pay temporary financial support for the petitioner and minor child unless the respondent has no duty to support the petitioner or minor child.

(3) When the respondent has a legal duty to support the petitioner or minor children living in the household and the household's residence is jointly leased or owned by the parties or the respondent is the sole owner or lessee, grant temporary possession to the petitioner of the residence to the exclusion of the respondent.

(4) Prohibit the transferring, destruction, encumbering, or otherwise disposing of real or personal property mutually owned or leased by the parties or in which one party claims an equitable interest, except when in the ordinary course of business.

(5) Provide for temporary possession of the personal property of the parties and order assistance from law enforcement officers in removing personal property of the petitioner if the respondent's eviction has not been ordered.

(6) Award costs and attorneys' fees to either party.

(7) Award any other relief authorized by § 20-7-420; provided, however, the court must have due regard for any prior Family Court orders issued in an action between the parties.

S.C.Code Ann. § 20-4-60 (c) (1985 & Supp.2006).

[3] The pertinent provision of this section provides:

(g) It shall be unlawful for any person-

(8) who is subject to a court order that-

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury;

...

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C.A. § 922(g)(8) (2000 & Supp.2007).

[4] See Tom Lininger, *A Better Way to Disarm Batterers*, 54 Hastings L.J. 525, 535-48 (2003) (discussing legislative history and constitutional challenges to ban of guns while restraining order is in effect pursuant to 18 U.S.C. § 922(g)(8)); *United States v. Miles*, 238 F.Supp.2d 297, 300-05 (D.Me.2002) (holding 18 U.S.C.A. § 922(g)(8) passes constitutional muster because it is a reasonable restriction on the right to bear arms and is narrowly tailored to support a compelling government interest); *United States v. Calor*, 172 F.Supp.2d 900, 905-07 (E.D.Ky.2001) (finding temporary deprivation of Husband's property right to enjoy firearms during three-day, pre-hearing seizure period was outweighed by government's interest in protecting victim of domestic violence from further violence and potential death); see also *Kellogg v. City of Gary*, 562 N.E.2d 685, 693 (Ind.1990) (discussing due process implications of Second Amendment right to bear arms in conjunction with issuance of civil temporary injunction).

[5] We note that if the findings are temporary, a respondent should no longer suffer the consequences under the federal statute given a respondent would no longer be "subject" to the court order. 18 U.S.C.A. § 922(g)(8) (2000 & Supp.2007); cf. *Weissenburger v. Iowa Dist. Court for Warren County*, 740 N.W.2d 431, 436 (Iowa 2007) (holding that Husband was prohibited from possessing firearms pursuant to 18 U.S.C.A. § 922(g)(8) where he was subject to a continuing no-contact order with Wife).

[6] In light of the problems highlighted by this case, we invite the Legislature to revise the Protection from Domestic Abuse Act in order to: clarify the non-

adjudicative nature of the emergency hearing; and define the temporary status of an Order of Protection as well as the findings associated with the issuance of such an order.

E4H:7 13

STATE OF SOUTH CAROLINA

COUNTY OF SALUDA

RICHARD CLARK

PLAINTIFF,

vs.

FAIRY BELL IRVING, ANDREW IRVING
A/K/A/ ANDREW ERVING, ALFONZO IRVING
A/K/A/ALFONZO ERVING, JOHN D. IRVING
A/K/A JOHN D. ERVING, WILLIAM T. IRVING
A/K/A WILLIAM T. ERVING, ROBERT IRVING,
SR., A/K/A ROBERT ERVING,SR., SALLY MAY
MORGAN, F/K/A SALLIE MAY IRVING, MINNIE
LEE BUTLER, F/K/A MINNIE LEE IRVING, JOYCE
THELMA TAYLOR, F/K/A JOYCE THELMA IRVING,
MARY IRVING A/K/A MARY ERVING, MAMIE
IRVING, A/K/A/ MAMIE ERVING, JESSIE INA
IRVING A/K/A JESSIE INA ERVING,, JULIOUS
IRVING, A/K/A JULIOUS ERVING, RASHELL
IRVING, A/K/A RASHELL ERVING, FAIRY
MAY IRVING, THELMA IRVING, ANNELL I RAY
JULIOUS IRVING, JR., ALFREDA IRVING,
THELMA CARTLELE, BENNIE WARREN BUTLER,
AND PERSONS CLAIMING ANY RIGHT, TITLE
ESTATE, INTEREST IN OR LIEN UPON THE
REAL ESTATE DESCRIBED IN THE COMPLAINT
HEREIN, ANY UNKNOWN ADULTS BEING A
CLASS DESIGNATED AS JOHN DOE; AND ANY
UNKNOWN MINORS OR OTHER PERSONS
UNDER LEGAL DISABILITY BEING A CLASS
DESIGNATED AS RICHARD ROE,

DEFENDANTS.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2008-CP-41-099

**MOTION
(Continuance)**

TO THE PLAINTIFF ABOVE-NAMED:

1. The Defendant, Thelma J. Irving, (hereinafter "Defendant"), received notice of the hearing scheduled for April 27, 2010, at 10:00 A.M. on April 7, 2010. (See attachment)

2. The Defendant properly filed an Answer to the Plaintiff's Complaint and in said Answer the Defendant specifically asked that the heirs be judicially determined, as the family tree of the title-holder to the property is very complex.

3. The Defendant attorney sent a request to Plaintiff's counsel on April 13, 2010 via facsimile and regular mail, asking that the hearing be continued because the Defendant had many witnesses in various states that had to make travel arrangements to be present and testify at the hearing.

4. In a subsequent telephone conversation on April 16, 2010 with Plaintiff's counsel, Defendant's counsel was informed that the Plaintiff would ask the Court for the property to be sold because the Plaintiff had over fifty percent of the interest in the subject property.

5. A hearing held for the sale of the property would be in direct contravention of the procedure enumerated in §15-61-25(A) thru (C) of the South Carolina Code of Laws, requiring that the relative interests of all parties be determined, the property be appraised and any non-petitioning co-tenant(s) be given an opportunity to purchase the petitioners interest before a "sale" can be timely.

6. The Defendant and her witnesses need at least thirty (30) days, or more, advance notice of the hearing to arrange travel plans to be present and offer testimony.

7. The Defendant asks that the hearing scheduled for April 27, 2010 at 10:00 A.M., be continued to allow time for out of state witnesses, including the Defendant, to properly arrange their travel plans. This motion is supported by the attached affidavit of Willie B. Heyward, Enquire.

SIGNATURE PAGE FOLLOWS

Willie B. Heyward
Attorney for Defendant Thelma Irving
Heirs' Property Law Center
2148 Dorchester Road, Ste. A
North Charleston, S.C. 29405

North Charleston, South Carolina
April ____ 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

Kathy O. Rushton, Special Referee

Case No. 2008-CP-41-099

RECEIVED
DEC 31 2012
SC Court of Appeals

BOBBY JO CLARK

Respondents

vs

FAIRY BELL IRVING

Appellants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is the Legal Assistant for Attorney Willie B. Heyward, Heirs Property Law Center, LLC for the above-named Appellants and that she is a person of such age and discretion as to be competent to serve papers.

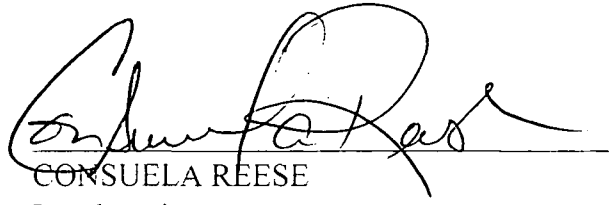
That on December 24, 2012, she served a copy of the following document(s) in the above-entitled case by placing said copy in a post-paid envelope addressed to the person hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States Mail in Charleston, South Carolina.

DOCUMENTS:

Memorandum in Support of Appellant's Return to Respondent's Motion to Dismiss Appeal

ADDRESSEE(s)

Christian G. Spradley
110 S. Main Street
Saluda, SC 29138

A handwritten signature in black ink, appearing to read 'Consuela Reese', is written over a horizontal line.

CONSUELA REESE

Legal Assistant

Heirs Property Law Center

**Heirs Property
Law Center, LLC**



27 Gamecock Ave., Suite 200
Charleston, SC 29407

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heirspropertylawcenter.org

December 24, 2012

Clerk of Court
Court of Appeals
PO Box 11629
Columbia, SC 29211

RECEIVED
DEC 31 2012
SC Court of Appeals

**Re: Appeal from Saluda County – Bobby Clark v. Fairy Irving
2008-CP-41-099**

Dear Clerk:

Please find enclosed the original and seven (7) copies of the Memorandum in Support of Appellant's Return to Respondent's Motion to Dismiss Appeal. By copy of this letter, I am serving these documents upon, Christian G. Spradley, Attorney for the Respondent. Please return a filed copy to our office in the self-addressed stamped envelope enclosed.

Thank you for your assistance with this matter.

Consuela Reese
Legal Assistant to
Willie B. Heyward
Attorney for Appellant

Enclosures

cc: Christian G. Spradley (With Enclosures)